No. 89-1330-CFX
Status: GRANTED

Title: International Organization of Masters, Mates & Pilots, et al., Petitioners
v.
Timothy A. Brown

Docketed:
February 15, 1990

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Pierson,W. Michel

Counsel for respondent: Levy,Paul Alan

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Entry	Date	Note	Proceedings and Orders
1	Feb 15 1990	G	Petition for writ of certiorari filed.
2	Mar 23 1990		Brief of respondent Timothy A. Brown in opposition filed.
3	Mar 28 1990		DISTRIBUTED. April 13, 1990
4	Apr 16 1990	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
5	May 29 1990	X	Brief amicus curiae of United States filed.
6	May 29 1990		REDISTRIBUTED. June 14, 1990
7	Jun 18 1990		Petition GRANTED.
			**********
9	Aug 1 1990		Order extending time to file brief of petitioner on the merits until August 10, 1990.
10	Aug 10 1990		Joint appendix filed.
11	Aug 10 1990		Brief amicus curiae of AFL-CIO filed.
12	Aug 10 1990		Brief of petitioner International Organization of Masters, Mates & Pilots, et al filed.
13	Aug 28 1990		Record filed.
		*	Certified copy of C. A. proceedings, 3 volumes, received.
14	Aug 28 1990	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
16	Sep 4 1990		Order extending time to file brief of respondent on the merits until September 26, 1990.
22	Sep 25 1990	X	Brief amici curiae of Association for Union Democracy, et al. filed.
18	Sep 26 1990		Lodging received.
19	Sep 26 1990		Brief amicus curiae of United States filed.
20	Sep 26 1990		Brief of respondent Timothy A. Brown filed.
21	Sep 28 1990		CIRCULATED.
17	Oct 1 1990		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
23	Oct 19 1990		SET FOR ARGUMENT TUESDAY, NOVEMBER 27, 1990. (1ST CASE)
24	Oct 29 1990	X	Reply brief of petitioner International Organization of Masters, Mates & Pilots, et al filed.
25	Nov 27 1990		ARGUED.

89-1380

No.

Supreme Court, U.S.
FILED
FEB 15 1990
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES & PILOTS,
ROBERT J. LOWEN, AND F. ELWOOD KYSER,

Petitioners,

v.

TIMOTHY A. BROWN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals's interpretation of section 401(c) of the Labor-Management Reporting and Disclosure Act as precluding consideration of the union's rule regulating distribution of union campaign literature in determining whether Brown's non-complying request to distribute literature was reasonable, which contradicts the holdings of two other circuits, is erroneous.

LIST OF PARTIES

In addition to the parties listed in the caption, the Secretary of Labor participated in the in banc proceedings as amicus curiae.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

No.

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES & PILOTS,
ROBERT J. LOWEN, AND F. ELWOOD KYSER

Petitioners

v.

TIMOTHY A. BROWN

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

International Organization of Masters, Mates & Pilots, Robert J. Lowen and F. Elwood Kyser respectfully petition the Court for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in Brown v. Lowen, et al, No. 88-2876, entered on November 17, 1989.

OPINIONS BELOW

The opinions of the panel of the Fourth Circuit which initially decided the case on September 14, 1988 are reported at 857 F. 2d 216 and are attached to this petition as Appendix A. The opinions entered on rehearing in banc are reported at 889 F. 2d 58 and are attached to this petition as Appendix B. The opinion of the district court is unreported and is attached to this petition as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on November 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

Section 401(c), Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481(c):

> Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similiar distribution of the request of any other bona-fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within 30 days prior to an election of a labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership therein as a condition of employment, which list

shall be maintained and kept at the principal office of such labor organization by a designated official thereof. Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots.

STATEMENT OF THE CASE

The International Organization of Masters, Mates & Pilots (MM&P) is a national labor union which has about 7,500 members, who are employed in the United States merchant marine. They occupy various positions around the country and the world related to shipping. The union has no locals, but includes several membership groups. The largest single group is the Offshore Membership Group, whose members work aboard deep sea vessels.

MM&P officers are elected every four years, by a mail ballot election. The election procedures are set forth in the MM&P constitution. The mail ballot

election lasts ninety days. Approximately thirty days prior to the commencement of the election, a convention is held, at which candidates are nominated. At that convention, a ballot committee of members is selected to oversee the election, as is an impartial balloting agency. The committee convenes after the close of the convention; at that time it selects an independent mailing service to mail the ballots and also examines the records of the persons who were nominated to determine whether they meet the constitutional qualifications for office so that they may be certified as candidates.

Candidates who wish to use the union mailing lists to mail campaign literature to members submit their literature to the independent mailing service, which mails the literature.

Under the procedures set forth in the union constitution and applied for many years, a candidate's right to make a campaign mailing begins after the convention. Once the independent mailing service is designated, the candidate makes his own arrangements with the mailing service to make mailings. There is no limitation upon the number of mailings which may be made, and mailings may continue throughout the period preceding the election and the ninety day election period itself.

Respondent Brown made a request in May, 1988, that he be permitted access to the union membership lists to make a mailing prior to the 1988 convention, scheduled for August 22, 1988. He stated that he planned to be a candidate for International President in the 1988 election. The union denied the request

based upon the longstanding application of the procedures set forth in the constitution.

Brown filed suit in the United States District of the District of Maryland, contending that his request to distribute literature before the convention was a reasonable request within the meaning of 29 U.S.C. § 481(c). Jurisdiction was founded on that section, which places the union and its officers under a duty to comply with any "reasonable" requests of a candidate to distribute literature, enforceable in the district court, and upon 28 U.S.C. § 1331. The court, deciding the case upon the parties' moving papers and affidavits, ruled in favor of Brown.

The union appealed to the Fourth Circuit. The case was initially heard before a three judge panel, which affirmed the decision of the district

court by a two-to-one majority, Judge Hall dissenting. The majority held that in determining whether Brown's request was reasonable, it did not need to consider the union's rule or the reasons for the rule, but instead should determine the reasonableness of the request based solely upon the request itself. It acknowledged that its interpretation of the statute contradicted that of the Third Circuit, but stated that it disagreed with that interpretation. The MM&P's petition for rehearing in banc was granted. After reargument, the in banc court adopted the panel opinion by an eight to two majority. Judge Phillips joined Judge Hall in dissent and filed a separate dissenting opinion.

REASONS FOR GRANTING THE WRIT

This case turns upon the interpretation of a statute that regulates union

election procedures, an important subject of federal concern. As is apparent from the opinions below, the resolution of this issue requires consideration of basic principles relating to the appropriate scope of regulation of the internal affairs of labor unions. The decision of the Fourth Circuit, whose underpinning is that the case could be decided without regard for the union's rule, strikes a hard blow at the principle of union self-government, a principle previously identified by this Court as an essential basis of the statute. This decision also conflicts with precedent from the Third and Ninth Circuits, which hold that reasonable union rules governing the distribution of literature should be followed. For these reasons, the case poses issues of public importance and should be reviewed by this Court.

The Fourth Circuit held that the sole question was whether Brown's request was reasonable, and that that question was to be resolved without regard to the request's compliance with the union's procedure for distribution of literature. It stated that this conclusion was "nothing more than a reading of the plain language of the statute." Opinion at 4. While an interpretation of a statute is always fortified if one can claim that it is no more than plain language, the issue is not that simple.

The plain language of the statute requires a union to comply with "reasonable" requests, not all requests. Thus, the statute itself necessarily poses the question of how a union should go about distinguishing between reasonable requests and unreasonable requests. One way to do this is to make

an individual determination, on the basis of each individual request, whether the request is reasonable or unreasonable. The other way is for a union to adopt a rule that treats all requests uniformly and provides advance notice to all candidates of the conditions to be applied. Nothing in the language of the statute forbids the second alternative, and thus plain language does not resolve the case.

As is apparent from the opinions below and the other authority on this issue, the choice between these alternatives depends upon the weight to be accorded the policies behind the statute. As Judge Phillips stated in his dissent, in deciding whether to give any consideration to the union's rule, a court decides whether a union is to be permitted to make rules governing election procedure. The determination

of the weight to be given the union rule in turn depends upon the weight to be given such values as union self-government. Thus, the statute cannot be interpreted without deciding questions relating to the policies underlying the statute.

This Court has previously made clear the importance of Congress's desire to preserve union self-goverment. In United Steelworkers of America v. Sadlowski, 457 U.S. 102 (1982), it stated:

> In drafting [LMRDA] Titles II through VI, Congress was guided by the general principle that unions should be left free to "operate their own affairs, as far as possible." S. Rep. No. 1684, 85th Cong., 2d Sess., 4-5 (1958). It believed that only essential standards should be imposed by legislation, and that in establishing those standards, great care should be taken not to undermine union self-government. Given certain minimim standards, "individual members are fully competent to regulate union affairs." Ibid. Thus, for example, in Title VI, which regulates the conduct of union elections, Congress

> simply set forth certain minimum standards. So long as unions conform with these standards, they are free "to run their own elections." Wirtz v. Glass Bottle Blowers, 389 U.S., at 471, 88 S. Ct., at 648.

457 U.S. at 117. The negation of the MM&P's power to govern itself is the more invidious because the procedure disregarded by the courts below is not a rule adopted by the union's officers, but a procedure set forth in the union's constitution, adopted by its members.

While the Fourth Circuit supported its decision by reference to the Act's purpose to foster free and democratic union elections, the court's decision ultimately frustrates union democracy by forbidding the union to adopt fair and orderly procedures.

Apart from the direct invasion upon a union's power to regulate its affairs which results from disregard of its rule in deciding a question of election

procedure, the Fourth Circuit's rule requires ad hoc evaluation of each request by a court without reference to the context of the request. That leads to judicial second guessing and needless government interference in internal union affairs.

The utility of this case as a vehicle for construction of the statute is enhanced by the fact that it turns entirely upon the interpretation of the statute and its underlying policies. As Judge Hall pointed out, "[i]n this case there has been no finding or even persuasive suggestion that IOMM&P's election procedures...is unfair, discriminatory, or provides any undue advantage to incumbents." The Fourth Circuit's decision does not rest upon a conclusion that the MM&P's rule is unreasonable, but rather upon the holding that the rule is entitled to no

consideration, without regard to whether the rule is reasonable or not and no matter what the reasons for its adoption and application.

The Fourth Circuit's decision conflicts directly with the decisions of two other circuits. Donovan v. Metropolitan District Council of Carpenters, 797 F. 2d 140 (3d Cir. 1986) and Marshall v. Provision House Workers Union, Local 274, Amalgamated Meat Cutters and Butcher Workmen, 623 F. 2d 1322 (9th Cir. 1980) hold that unions are entitled to adopt and enforce reasonable nondiscriminatory rules for the distribution of campaign literature in compliance with section 401(c) and that the appropriate focus in determining whether a request is reasonable is on such rules. Both courts emphasize the important statutory policies which require this result.

Thus, the Third Circuit in Metropolitan District Council, stated:

> We agree that a union may adopt and enforce reasonable, non-discriminatory rules for the distribution of campaign literature in compliance with section 401 (c). Unlike the ad hoc balancing test which the Secretary here would require the union leadership to engage in whenever a request for distribution is made, permitting the imposition of uniform rules avoids even the appearance of disparate treatment. Moreover, by minimizing judicial second-guessing, permitting such rules furthers the Act's policy of "balanc[ing] between the public interest in free and democratic union elections on the one hand, and the importance of minimizing government encroachment on union autonomy, on the other hand,"Brennan v. Local 122, Amalgamated Clothing Workers, 564 F. 2d 657, 660 (3d Cir. 1977) (footnote omitted).

797 F. 2d at 144. Similarly, in Provision House, the Ninth Circuit, indicating that a union's administrative reasons for adopting standards to govern mailing were entitled to respect, stated:

> Making exceptions to the rule, by complying with the challengers' late distribution requests, could have undercut the purpose of the election rules--to eliminate the potential for discrimination among candidates by establishing a uniform set of standards governing all candidates. Candidates challenging incumbent union officers normally expect to do some homework and to comply with rules. We conclude that the district court could properly find that, because strict enforcement of the ten-day rule was necessary, distribution requests violating that requirement were unreasonable and the union had no duty to comply with them.

(623 F. 2d at 1325-1326).

The conflict between the circuits also makes review important to parties other than those before the Court. Without a single governing interpretation of the statute, the status of the rules of all other unions is uncertain. The issue of whether a request to distribute literature is properly granted or denied may arise not only upon the pre-election suit of a candidate, but also upon the Secretary of Labor's suit, pursuant to 29 U.S.C. § 482, to set aside an

election already held. Resolution of the conflict will assist unions and candidates nationwide in measuring their rights and duties, as well as the Secretary.

The conflict between the Fourth's Circuit's decision and the principles set forth in these cases and in Sadlowski suggests that review is appropriate. The lower court's decision severely impinges on the power of unions to govern themselves, in contravention of the legislative intent and precedent. The construction of the statute required by this case furnishes an opportunity to decide important issues relating to the purview of federal regulation of union affairs. For these reasons, petitioners submit that review is in the public interest.

CONCLUSION

For the reasons stated, it is respectfully prayed that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2876

TIMOTHY A. BROWN, Plaintiff-Appellee,

v.

ROBERT J. LOWEN, F. ELWOOD KYSER, and INTERNATIONAL ORGANIZATION OF MASTERS, MATES, AND PILOTS Defendants-Appellants,

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Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (C.A. 88-1994-JFM)

Argued: July 28, 1988
Decided: September 14, 1988

Before RUSSELL, WIDENER and HALL, Circuit Judges.

W. Michel Pierson for Appellants. Paul Alan Levy (Arthur L. Fox, II; Alan B. Morrison, PUBLIC CITIZEN LITIGATION

GROUP on brief) for Appellee.

RUSSELL, Circuit Judge:

This appeal is from an order of the district court issuing a preliminary injunction in favor of the plaintiff, Timothy Brown. Plaintiff is a candidate for president of the International Organization of Masters, Mates and Pilots (IOMPP) of which defendant, Robert Lowen, is the current president. The district court has ordered IOMPP to provide plaintiff with mailing labels containing the names and addresses of voting members of the union. Though the order of the district judge related to an application for a preliminary injunction, the granting of the motion in effect constituted a decision on the merits. Accordingly, we have reviewed this case on the merits, doing so, we affirm the decision of the district

court as one on the merits.

IOMPP is a labor organization comprised of workers in the maritime industry. The union conducts quadrennial elections of its officers. Nominations of candidates for these offices are made at the union's convention. Any eligible member of the union may be nominated. To be eligible a person need be a union member in good standing. A member may even nominate himself. Ballots containing the names of those nominated are then mailed to members of the union not sooner than ten days nor later than thirty days after the end of the convention. The union then allows ninety days from the mailing of the ballots until they must be returned.

The crux of this dispute arises from plaintiff's desire to distribute campaign literature, at his own expense,

to the union's membership before the nominating convention. Only through the union can plaintiff obtain a complete list of the union membership with their addresses. However, the procedures used by the union provide that the "[t]he right to distribution of literature only commences after the nomination procedure is complete."

The Labor-Management Reporting and Disclosure Act of 1959 at 29 U.S.C. § 481(c), however, provides in pertinent part that unions and their officers "shall be under a duty, enforceable at the suit of any bona fide candidate for office... to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization..." It is on this provision

of the Act that the plaintiff relies for his right to have his campaign material mailed to union members within thirty days before the quadrennial meeting of the union.

The Act seems plain on its face: If the request to distribute by one qualified to be a candidate for union office, even though he is yet to be nominated is "reasonable" the union is required to "comply with all [such] reasonable requests." This language conditions the right of the contesting union office seeker to have his campaign material distributed only on the reasonableness of his request. If his request is reasonable, the language of the statute granting the request is mandatory. Whether the request is reasonable is a matter to be determined consistent "with the Act's command to unions to conduct 'free and democratic'

union elections." Steelworkers v. Usery, 429 U.S. 305, 309 (1977). Accordingly, if it can be said that the candidate's request is reasonable the statute upholds the right of the candidate to have his request granted. Such conclusion is nothing more than a reading of the plain language of the statute and, we said recently in United States v. Morison, 844 F. 2d 1057, 1064 (4th Cir. 1988), when the terms of "a statute are unambiguous on their face, or in light or ordinary principles of statutory interpretation, then judicial inquiry is complete (citations omitted)." We find that whether the plaintiff is entitled to have his request granted depends entirely on whether his request may be said to be reasonable.

Our reading of the statute accords with the administrative construction of

the statute's mandate as declared by the Secretary of Labor, to whom the enforcement of the statute is entrusted. The Department of Labor has repeatedly declared that the statutory command is to be observed if it is reasonable. It has stated categorically that, under its construction of the statute, the critical issue is not whether the union's rules or by-laws are reasonable (as the union argues) but whether the request of the plaintiff is reasonable, primarily in its timing. Indeed, in a letter to the union regarding this specific request of the plaintiff, the Director of the Office of Elections, Trusteeships and International Union Audits of the Department of Labor, advised that

> A self-professed candidate is entitled to make campaign literature mailings at his own expense and may ask the union to have them sent within a

> reasonable period of time prior to the election. In the present situation, a request for a mailing to be made approximately one month prior to nominations would appear to be reasonable. Failure or refusal by the union to honor a legitimate mailing request is a continuing violation of Title IV which might, under certain circumstances, affect the outcome of the election.

While this opinion of the Department is not binding, it is an opinion entitled to consideration by this Court and is not to be lightly disregarded.

Moreover, this opinion of the Department seems to be in clear accord with Congress' intent of "insur[ing] union democracy" in its enactment of 11 U.S.C. § 481. Professor Clyde Summers who authored a "Bill of Rights for Union Members" which formed the basis of the statute in question, has stated that "[t]he declared and unquestioned purpose of Congress was to ensure fair and democratic elections. Congress

recognized that one of the major obstacles to meaningful elections was the inherent advantage of incumbents and it sought to curb the advantage." Summers, Democracy In A One-Party State: Perspectives From Landrum-Griffin, 43 Md. L. Rev. 93, 117-118 (1984). When the union bureaucracy has exclusive control of the union membership lists, with addresses, as in this case, and particularly the local union officers, the advantages of incumbency over any attempt of an insurgent to promote his candidacy before or after the quadrennial nominating convention of the union are obvious. By requiring unions to comply with all reasonable requests of candidates for access to the union lists these advantages of incumbency are reasonably moderated. And it was to provide that very moderation of the advantages of incumbency which was the

intention of the Act.

There does not seem to be any contention that the request of the plaintiff herein is unreasonable. Nor do we understand the union to argue that plaintiff's request is unreasonable. Its position is that the union by-laws provide that "[t]he right to distribution of [campaign] literature only commences ater the nomination procedure is complete." Whether intended or not, the manifest result of this is to delay the insurgent candidate in beginning his campaign and to reduce the time within which he can make his appeal to the voters. The incumbents, however, have had four years in which they have enjoyed the exclusive right to the voter lists and addresses and to cultivate their relations with the local union officers who would be expected to have the greatest influence with the

rank and file. During all this time, too, the incumbents had had control over the union press and its newsletter to the members. The advantages of the union by-law to the incumbent cannot be questioned. However, the union justifies its by-law as a reasonable method of satisfying the Act's prohibition against "discrimination in favor of or against any candidate with respect to the use of lists of members..." Beyond that, it takes the position that the relevant reasonableness standard is not the one to be applied in determining the reasonableness of the insurgent's request, but is the one to be applied in determining the reasonableness of the union's restraint on the right to have his "reasonable request" granted. We are not persuaded by the union's reasoning.

In the first place, we find nothing discriminatory in granting the plaintiff's request made within thirty days of the quadrennial convention, since any candidate, whether an incumbent or an insurgent, has the same rights as the plaintiff. Granting the plaintiff's request is simply an attempt at a partial redress of the advantage the incumbent has; it is not an attempt at hobbling or gaining any advantage over any other candidate. The union has identified no way in which granting the plaintiff's request will operate as a discrimination against any other possible candidate for union office. Actually, the granting of the request simply reduces the discrimination of exclusive control by the union incumbents over the electoral lists. There is no conceivable way in which the granting of plaintiff's request will

work a discrimination against any other union members.

Neither do we agree with the union that the question posed by this controversy is the reasonableness of the union's by-law. The criterion for resolving this controversy is the reasonableness of the plaintiff's request. Of course, in assessing the reasonableness of the request it is entirely proper to consider whether granting the request would work a discrimination against other candidates. But that question is to be considered as a part of the question whether the plaintiff's request was reasonable. So far as we are able to understand, the union does not urge in objection to plaintiff's claim that the granting of his request will result in any discrimintion. And well they could not, since any other candidate could exercise

exactly the same right as that requested by the plaintiff.

It follows that we find no basis in this record for excusing the union from conforming with the plain command of the statute. It certainly stands the statute on its head to do as the union argues by making the issue the reasonableness of the union by-law rather than, as the statute declares, making the issue the reasonableness of the plaintiff's request. The command of the statute may not legitmately be subordinated to the somewhat ambiguous language of a union by-law. Such a rule would render union by-laws superior to the congressional mandate and would provide dissident unions with a ready means for nullifying the statute's command. We are not disposed to uphold such a misconception of congressional power in this field. We think the

district court ruled correctly in granting relief to the plaintiff.

We are aware that our judgment is contrary to that of the Third Circuit as expressed in Donovan v. Metropolitan District Council of Carpenters, 797 F. 2d 140 (3d Cir. 1986). In that case, the Third Circuit upheld the union's decision not to release mailing labels prior to a certain date because "[t]he union's rule here was a reasonable one." Ibid. at 144. As we have previously stated, we believe the test to be not whether the union's rule was reasonable but whether the candidate's request was reasonable. For this reason, we respectfully disagree with the judgment of the Third Circuit.

Accordingly, the judgment of the district court is

AFFIRMED.

HALL, Circuit Judge, dissenting:

I cannot agree with the majority that IOMPP has failed to comply with its duty to honor a reasonable request by a candidate for union office. In my view, a request for mailing that conflicts with the established internal procedures of a union is per se unreasonable unless the union's procedures are shown to be unfair or discriminatory. By affirming the district court's contrary conclusion, the majority has today adopted an unduly restrictive interpretation of the Labor Management Reporting and Disclosure Act ("LMRDA" or "the Act") that is inconsistent with the statutory purpose and in clear conflict with the decisions of two of our sister circuits.

As the majority correctly recognizes, the Act implements Congress' clearly expressed desire to promote

"union democracy." I further agree that, as a corollary to that goal, the statute prohibits undue electoral discrimination in favor of incumbents. Democracy, however, is not a standardless expression of majority rule but, rather, a system of ordered liberty in which the will of the electorate is determined through fair and equitable procedures. In this case there has been no finding or even persuasive suggestion that IOMPP's election procedures limiting candidate mailings until after the formal nomination process is unfair, discriminatory, or provides any undue advantage to incumbents. The majority, as did the district court, has concluded, however, that the fairness of the union's rules is irrelevant and that the reasonableness of a would-be candidate's request is to be assessed

solely by examining the request itself.[1] In my view that approach is not only simplistic but also threatens the broader goals of the Act.

In the first instance, the reasonableness of any action requires consideration of the underlying factual context. A request to light a candle in a darkened room may seem eminently reasonable if examined in isolation but when the same request is made in a room filled with gas fumes, the reasonableness is substantially diminished. While appellee Brown's request that the union mail his campaign literature without regard to its established procedure may have carried

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1. Contrary to the majority's suggestion, the union has sought to argue that appellee's request for mailing was unreasonable. The union simply bases its argument, in a broader context, than the majority is willing to consider.

union's ability to organize its own internal affairs.

The Supreme Court has recognized that the LMRDA was not intended to "undermine union self-government." United Steelworkers of America v. Sadlowski, 457 U.S. 102, 117 (1982). Moreover, the Court noted that although incombency carries certain undoubted natural advantages, it should not be overstated. Id. at 114. Logically, the Act does not sanction judicial intrusion into union internal matters unless the union has unfairly distorted the normal democratic process to favor incumbents. I can see no indication that IOMPP's rules which appellee seeks to avoid would accomplish that end.

Both the Third Circuit in Donovan v. Metropolitan District Council of Carpenters, 797 F. 2d 140 (3d Cir. 1986), and the Ninth Circuit in Marshall

v. Provision House Workers Union, Local 274, Amalgamated Meat Cutters and Butcher Workers, 623 F. 2d 1322 (9th Cir. 1980), have concluded that a candidate's compliance with reasonable nondiscriminatory union procedures is relevant to whether a mailing request is itself reasonable. I would agree completely with the Donovan court that fair uniform rules which avoid even the "appearance of disparate treatment" and minimize the likelihood of "needless judicial second guessing." Donovan, 797 F. 2d at 144 are not to be treated lightly in judicial proceedings.

In contrast to the salutary doctrine developed in the Third and Ninth Circuits, the majority has concluded that unions are without power to structure their own electoral process even when that process serves the Act's broader purposes of promoting union

democracy. I cannot accept that section 481(c) of the statute requires such an irrational result.

[2] Accordingly, I would reverse the district court and, therefore, I respectfully dissent from the majority's decision.

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2. I find little significance in the fact that the Secretary of Labor has taken a position in this case similar to that articulated by the majority. While the views of the administrative agency to which statutory enforcement is entrusted are entitled to some deference, we need not accept those views blindly. In this instance, the Secretary's position is not only contrary to reasonable statutory interpretation, it is also arguable in conflict with his own regulations. At 29 C.F.R. § 452.67, the Department of Labor clearly envisions that distribution of campaign literature may be subject to rules governing the methods of distribution and requires the union to inform all candidates of the nature of those conditions. The Secretary's instant position renders any such distribution rules superfluous.

APPENDIX B

Timothy A. BROWN, Plaintiff-Appellee,

v.

Robert J. LOWEN, F. Elwood Kyser,

International Organization of Masters,

Mates and Pilots, Defendants-Appellants.

No. 88-2876

United States Court of Appeals,

Fourth Circuit.

Argued April 10, 1989.

Decided Nov. 17, 1989.

W. Michel Pierson, Baltimore, Md., for defendants-appellants.

Paul Alan Levy (Arthur L. Fox, II, Alan B. Morrison, Public Citizen Litigation Group, Washington, D. C., on brief), for plaintiff-appellee.

Helen Boetticher, Counsel for Litigation (Jerry G. Thorn, Acting Sol., John F. Depenbrock, Associate Sol, Barton S. Widom, Deputy Associate Sol., Sharon E. Hanley, U.S. Dept. of Labor,

Washington, D. C., on brief), for amicus curiae.

Before ERWIN, Chief Judge, and RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, CHAPMAN, WILKINSON, and WILKINS, Circuit Judges.

ON PETITION FOR REHEARING AND

SUGGESTION FOR REHEARING

IN BANC

PER CURIAM:

The en banc court adopts the majority panel opinion sustaining the district court's grant of an affirmative injunction in favor of the plaintiff-appellee against the defendants-appellants, as its opinion herein. Brown v. Lowen, 857 F. 2d 216 (4th Cir. 1989). Judge Hall, however, adheres to his dissent to the panel opinion and relies on it in dissent to the en banc decision herein, and Judge Phillips in joining Judge Hall's dissent has filed a

separate dissenting statement of his views.

AFFIRMED.

PHILLIPS, Circuit Judge, dissenting:

I agree with Judge Hall's view, and that of the Third and Ninth Circuits, as I understand them, that the first step in assessing the reasonableness, under §481(c), of a candidate's request that is at odds with a union's general rule on the subject, is to consider whether the general rule is unfair or arbitrary in its general application. If a union's general rule is not unfair or arbitrary in its general application, then a candidate's request to be exempted from its requirements is obviously "unreasonable." If this is not so, then there is little reason for unions to attempt to regulate election procedures by general rules. All of us can probably demonstrate from time to

time that general rules of one kind or another--from traffic laws to income tax laws--are unreasonable in their particular applications to us, hence that our request for specific exemptions would be "reasonable" if assessed independently of the general rule's justification. For democracy to work in union affairs as in affairs at large, however, it must be considered unreasonable for an individual to insist upon being made a special case, exempt from the requirements of general laws that are not unfair or arbitrary in their general application.

Because the district court failed to apply this principle, I would vacate the preliminary injunction and remand for further proceedings faithful to it.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

TIMOTHY A. BROWN	:	
v.	:	Civil No. HAR-88-1994
ROBERT J. LOWEN,	:	
et al.	:	

MEMORANDUM

The purpose of this memorandum is to restate briefly the reasons recited by this Court on the record on July 25, 1988 for the issuance of a preliminary injunction.

Plaintiff is running for president of the International Organization of Masters, Mates and Pilots ("IOMMP"). The preliminary injunction which he has sought and which this Court has issued requires defendants to mail his campaign literature to the union membership at his own expense. The critical issue

presented in this case is the validity of an IOMMP rule which permits the distribution of campaign literature only after IOMMP's convention has been held and approximately ninety days before the election ballots which are distributed after the convention to the membership must be returned.

A threshold question is presented as to the standard by which this Court is to review IOMMP's rule. Defendants contend that the inquiry which this Court must make is whether the rule is "reasonable." This Court does not agree. 29 U.S.C. Section 481(c) clearly provides that unions and their offiers "shall be under a duty, enforceable at the suit of any bona fide candidate... to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature

in aid of such person's candidacy to all members in good standing of such labor organization." This mandate could not be more clear. Thus, although a union certainly may- indeed should- adopt a rule known to all candidates in advance setting forth the terms and conditions under which campaign literature will be distributed by the union, in evaluating the validity of the rule a court must inquire not simply whether the rule may be said to be "reasonable" but whether its application results in the rejection of a reasonable request made by a candidate. The IOMMP rule here in question unquestionably has that effect since the request being made by plaintiff- to distribute his campaign literature approximately one month before the union's convention is held- is clearly reasonable.

Even if the standard of review is the "reasonableness" of the IOMMP's rule, this Court finds that the rule is unreasonable.

First, a rule which prohibits pre-convention distribution of campaign literature is per se unreasonable. Although under IOMMP's constitution a candidate may self-nominate himself at the convention, the dynamics of the political process are such that in order to promote an effective candidacy, a non-incumbent candidate must have the opportunity to have the convention delegates consider the merits of his candidacy before they assemble. These delegates are leaders of their leaders of their local unions, and it is obviously important to a candidate to attempt to elicit their support in order to have them work for them during the post-convention election process. It is

virtually impossible for a non-incumbent candidate to engender such support at the convention itself without having had an opportunity to introduce himselF and his ideas by mailings made prior to the convention. A lawyer might as well walk into trial unprepared.

Second, although a ninety day period between the time that campaign literature is sent out and the time that ballots must be returned may seem reasonable on its face, it is undisputed that the nature of the work of the members of the union takes them away from home for substantial periods of time. This is the very reason for the relatively long ninety day period for the return of ballots. Under these circumstances while it may be that the campaign literature will have been distributed to the union members by the time that they exercise their vote, it

is unrealistic to believe that union members will have conferred with one another concerning the merits of the respective candidacies before casting their ballots within the ninety day period. This underscores the need for an earlier mailing.

It is for these reasons that this Court entered a preliminary injunction in favor of plaintiff. This injunction is stayed pending defendants' seeking to obtain a decision from a Judge of the Fourth Circuit either reversing the granting of the injunction or continuing the stay pending review of the injunction by a full panel of the Court.

Date: July 26, 1988

/s/ J. Frederick Motz
United States
District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

TIMOTHY A. BROWN,	:	
Plaintiff,	:	
v.	:	Civil No. HAR 88-1994
ROBERT J. LOWEN, F. ELWOOD KYSER and INTERNATIONAL ORGANIZATION of MASTERS, MATES, AND PILOTS,	:	
Defendants.	:	

ORDER

The Court finds that plaintiff is likely to succeed on the merits, that the balance of hardships is decidedly in favor of the plaintiff, and that the public interest favors preliminary relief. Accordingly, IT IS HEREBY ORDERED THAT

1. Defendants Robert Lowen, Elwood Kyser, and International Organization of Masters, Mates, and Pilots ("IOMMP") shall, within forty-eight hours, and

again in response to any future requests, deliver a set of Cheshire labels bearing the names and addresses of all members of the IOMMP who are eligible to vote in upcoming election of officers, or any groups of members requested by Brown whose names can be segregated by the computer on which the list is kept, to a mailing service which is acceptable to the parties and which is capable of mailing plaintiff Brown's literature by the use of such labels.

2. Plaintiff Brown shall pay to defendant IOMMP $100.00 for the cost of preparing a set of mailing labels. Plaintiff Brown shall also be responsible for all costs of the mailing service.

Dated: July 25, 1988

/s/ J. Frederick Motz

Supreme Court, U.S.
FILED
MAR 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1330

IN THE
Supreme Court of the United States

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, ROBERT J. LOWEN, and F. ELWOOD KYSER,
Petitioners,

v.

TIMOTHY A. BROWN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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March 23, 1990

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QUESTION PRESENTED

Did the Court of Appeals correctly conclude that petitioners were obligated to comply with respondent's reasonable request to distribute his campaign literature to the union membership, at his own expense, before the union's nominating convention?

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IN THE

Supreme Court of the United States

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INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, ROBERT J. LOWEN, and F. ELWOOD KYSER,
Petitioners,

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT

A. Facts.

Petitioner International Organization of Masters, Mates and Pilots ("IOMMP") is a national union, virtually all of whose members work as ship's officers or pilots, or in similar positions. Almost all of the members spend their working lives on board ship, and they are often away from home for long periods of time. As a result, it is very difficult

for a member who wishes to communicate with his fellow members about issues facing the union to do so without using the mails. The only complete membership mailing list is in the hands of the union, which can generate computerized labels at a very low cost.

This case arose when the union was about to conduct its quadrennial election of officers. Nominations were to be made at the union convention in late August, 1988, and ballots were to be mailed out at some time between ten and thirty days after the convention ended. Recognizing that it is often quite some time before members return home and collect their mail, the union allows a lengthy period of time — ninety days — between the mailing of the ballots and the deadline for their return. But the undisputed evidence in the district court was that most members return their ballots shortly after receiving them.

Brown sought to mail his campaign literature before the convention in order to encourage the membership to start considering his candidacy, and the issues he hoped to raise in the election campaign, before the deadline for making nominations. In that way, he hoped to persuade the membership that he was a good candidate, and to attract support from other members who were dissatisfied with the incumbents, but who, in the absence of a known alternative, might run for office themselves or commit themselves to support the candidacy of others.

Not surprisingly, the officers of the union, including petitioners Robert Lowen and Elwood Kyser, were not anxious to facilitate respondent's candidacy. They enjoy a monopoly over the official channels of communication within the union, which consist primarily of a union newspaper whose editorial board consists solely of the incumbent officers themselves. By the use of this medium, the officers are able to generate a steady stream of "news" articles promoting their views concerning the problems facing the union, in effect setting the agenda for decisions about the

union that the membership must make through the election process.

Accordingly, on May 9, 1988, respondent notified petitioner Kyser that he wished to send a mailing to the union's membership at his own expense, and requested information about the cost of the labels and the time that it would take to produce them. When Kyser did not respond, respondent repeated his request to petitioner Lowen, the IOMMP President, and Kyser then denied the request on June 7, insisting that no mailings would be permitted until after the convention and then only after the union had selected an "impartial" agency to supervise the balloting. The union's constitution does not expressly contain such a rule, but petitioners took the position that, because the constitution provides for the selection after the convention of a balloting committee and an "impartial balloting agency", and because such bodies are responsible for matters such as campaign mailings, no mailings could be conducted until that agency was selected. On June 15, Brown appealed this decision to the union's executive board, which denied the request on July 6, 1988.

B. Proceedings Below.

On July 11, 1988, respondent filed suit in the United States District Court for the District of Maryland, alleging that he was a bona fide candidate for union office and that petitioners had violated their obligation under section 401(c) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 481(c), to honor his reasonable request that the union distribute his campaign literature at his own expense. Almost simultaneously, the Department of Labor, which had been furnished with copies of respondent's requests and of petitioners' response, wrote to respondent and petitioners explaining that the IOMMP's position was contrary to the requirements of the Act.

Respondent moved for a preliminary injunction, arguing that his request to have his literature mailed to the union membership only eight weeks before the latest date on which the ballots could be mailed was entirely reasonable. Petitioners argued that they should be permitted to insist on compliance with their practice of allowing mailings only after the candidates had been nominated and the list of nominees officially certified as eligible, although petitioners conceded that respondent was eligible to run for office. Respondent argued in response that the union's rule was contrary to law, because the regulations of the Secretary of Labor specify that a candidate is entitled to have mailings done as soon as he declares his candidacy, whether or not he has been nominated, and that in any event the focus of the inquiry should be on the reasonableness of his request, not the reasonableness of the union's rules.

District Judge J. Frederick Motz granted the preliminary injunction. He first held that, under the language of the statute, a court's focus must be on whether the candidate's request was a reasonable one, not whether the union had adopted a reasonable rule. This did not mean that unions could not adopt rules governing the conditions under which candidates could make mailings to the membership, but that such rules would not be judged merely by determining whether they were themselves reasonable; rather, a union rule could be held to be reasonable only if its application would result in the granting of all reasonable requests. Under this analysis, Judge Motz held, a request to distribute campaign literature one month before a union's convention was plainly reasonable, and a union rule that resulted in the denial of such a request was plainly unreasonable. Pet. App. 3c.

But even if the standard of review depended on whether the union's rule was reasonable, Judge Motz found the IOMMP rule at issue here to be unreasonable. Pet. App. 4c. First, any rule that forbade any pre-convention mailings would be per se unreasonable, because the dynamics of the

political process are such that in order to promote an effective candidacy, any non-incumbent candidate must promote himself to the convention delegates, who represent the various constituencies within the union, and thus to elicit their support during the post-convention election process. *Id.* Second, although the IOMMP allows a ninety-day period for return of ballots, the reason for the lengthy period is that the nature of the members' work means that many of them will not get their mail immediately. Thus, effective campaigning requires the dissemination of campaign material before the union's convention to ensure that the membership will have had a chance to see the material, digest it, and discuss it with their fellow members before they return to their homes and see and mail their ballots. *Id.* at 5c-6c.

Petitioners then appealed to the court of appeals, which upheld the preliminary injunction. In an opinion by Judge Russell, who was joined by Judge Widener, the court noted that the Secretary of Labor had considered respondent's request and had specifically ruled that it was a reasonable one whose denial would be a violation of the Act. This conclusion, the court noted, was entitled to judicial deference. Pet. App. 7a-8a. Moreover, the majority continued, the section 401(c) requirement of union mailings of campaign literature was adopted by Congress for the precise purpose of eliminating one of the advantages of incumbency — *i.e.*, the incumbents' otherwise-exclusive control over the membership list. Pet App. 9a. Yet the effect of the union's rule barring campaign mailings before the convention was to delay the beginning of a non-incumbent's campaign and thus to reduce the time within which he could appeal to the electorate. *Id.* 10a. Moreover, petitioners' principal justification for the rule — the prevention of discrimination among candidates — was sheer makeweight because any candidate could have exercised the right to make a reasonable request just as respondent Brown had done. *Id.* 11a-12a. Finally, the

majority ruled that the focus of judicial analysis must be the reasonableness of respondent's request, not the reasonableness of petitioners' rule. *Id.* 13a-14a. Here, the union had not denied that the member's request was a reasonable one, *id.* 13a, and so the relief granted by the district court was appropriate. *Id.* 15a.

Judge Hall dissented. He concluded that because the IOMMP had established procedures for mailings, a member's request had to be considered improper if it contravened those established procedures. *Id.* 18a. To support this extraordinary proposition, he relied on dicta in this Court's ruling in *Steelworkers v. Sadlowski*, 457 U.S. 102, 117 (1982), to the effect that a different part of the LMRDA was not intended to "undermine union self-government." Pet. App. 19a. According to Judge Hall, a union's rule must be followed unless the court decides that the union has "unfairly distorted the normal democratic process to favor the incumbents," *id.*, a showing that Judge Hall felt had not been made in this case. Judge Hall also invoked the analysis of the Third and Ninth Circuits that had, in the context of different section 401(c) claims, indicated that the proper approach was to decide whether the union's rule was itself reasonable. *Id.* 19a-20a, *citing Donovan v. Carpenters Philadelphia District Council*, 797 F.2d 140 (3d Cir. 1986); *Marshall v. Meat Cutters Local 274*, 623 F.2d 1322 (9th Cir. 1980). Judge Hall acknowledged, as neither of those cases had done, the need to defer to administrative interpretations of the Act, but he concluded that deference was improper here because the Secretary's view seemed contrary to "reasonable statutory interpretation" and to one of her own regulations which encouraged unions to adopt rules governing campaign mailings, but did not specify the required contents of such rules. Pet. App. 21a n.2, *citing* 29 C.F.R. § 452.67.

The court of appeals granted rehearing *en banc*, and the Secretary of Labor entered the case in support of the position of respondent Brown, filing a brief as *amicus curiae*

and participating in oral argument. The *en banc* court reaffirmed the decision of the panel, with eight judges adopting the majority panel opinion as their own. *Id.* 2b. One additional circuit judge agreed with the dissenting opinion, explaining that it was automatically unreasonable for a member to request a special exemption from a union rule, and that such a request would be per se unreasonable unless the rule itself was "unfair or arbitrary." *Id.* 3b-4b.[1]

REASONS FOR DENYING THE WRIT

Although the Question Presented Is Important, The Outcome of this Case Does Not Depend on Its Resolution, and the Issue Deserves Further Development in the Lower Courts Before the Court Decides Whether Review Is Required.

1. On the surface, the quarrel raised by the petitioners with the decision below — that the court focused on the reasonableness of Brown's request rather than the reasonableness of the union's rule — may seem like an

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[1] While petitioners' suggestion of *en banc* consideration was pending, the IOMMP election was completed, and respondent lost by a small margin. However, the Secretary of Labor has sued to set aside that election and conduct a new one, on several grounds, including extensive ballot fraud; the issue of the timing of campaign mailings will likely arise during that rerun election. Additionally, while the case was before the court of appeals, respondent represented that he would seek to exercise the same right in petitioners' next regularly scheduled election. Obviously, cases such as this one, as is typical of cases involving election procedures, *e.g.*, *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974), arise quickly and are normally resolved on an expedited basis based on a motion for a preliminary injunction. Accordingly, although respondent's original request has been granted and the complaint itself is moot, the issue is capable of repetition yet evading review, and the lower court had jurisdiction to decide this case.

exercise in question-begging. After all, in the end a court will have to decide the question of reasonableness, and in making that decision it will have to weigh the same combination of factors including the interests of the union as an institution and the interests of the candidate, in light of the Congressional objective of union democracy.

But there are two reasons why the difference between these two approaches is significant. First, if unions are entitled to adopt reasonable rules limiting the right to do campaign mailings, the implication is that there is some range of permissible rules, some of which allow more mailings or make them easier, and some of which allow fewer mailings or make them more difficult to accomplish, and that the union's decision to impose limitations will be upheld so long as its rule falls within the range of reasonableness. In effect, the courts reviewing a dispute between the union and the candidate would defer, to a greater or lesser degree, to the union's judgment about the balancing of interests. By contrast, if the issue is the reasonableness of the request, it is the candidate who is entitled to choose, and the courts would require the union to honor that choice so long as the member has acted within the range of reasonableness.

Second, a rule is presumably reasonable so long as, in most instances, it would meet the legitimate interests of candidates without unduly harming the institutional interests of unions. The facts that there may be some small number of candidates whose legitimate interests would be ill served by the rule, or that a more perfect rule could be devised without great difficulty, would not be a ground for insisting that the candidate's request be honored. If the law requires compliance with any reasonable request, however, the fact that the request is contrary to a rule that would allow most reasonable requests to be honored would be no defense.

In effect, then, respondent's focus on the reasonableness of the request is likely to result in the

allowance of more campaign mailings, while petitioners' focus on the reasonableness of the rule — assuming that most election rules tend to favor incumbents because of the manner in which they are enacted and enforced — is likely to make it harder for insurgents to exercise this right. Moreover, a focus on the reasonableness of the request is likely to facilitate the litigation of disputed requests in the context of preliminary injunction proceedings (which are the only way to resolve controversies that arise in the course of an ongoing election), because the litigation can focus on the single request rather than on the possible inequities of the union's entire system. That is why, apart from the hostilities that frequently accompany heated electoral challenges, petitioners (the incumbents of the IOMMP) and respondent (a member of a long-time insurgent group within the IOMMP) are so interested in the legal question in this case.

2. Thus, we agree with petitioners that the issue of the standards governing union members' requests to have the union do campaign mailings is an important question of federal law whose resolution by this Court may ultimately be required. We do not, of course, share petitioners' view that the desire to minimize intervention in union affairs requires courts to give as crabbed an interpretation as possible to the standards that are incorporated in the LMRDA. To the contrary, the Court has viewed limitations on the ability to run for union office with a jaundiced eye, *e.g.*, *Steelworkers Local 3489 v. Usery*, 429 U.S. 305, 309-313 (1977), and there is no reason to conclude that union efforts to restrict a candidate's ability to wage a vigorous campaign should be given any more weight. Nor is there any reason to believe that Congress intended the courts to assess such restrictions by deciding whether the candidate complied with a "reasonable rule," because other sections of the LMRDA make plain that when Congress intended that the focus of the inquiry be on the union's rule, it used language precisely directed to that end. *E.g.*, LMRDA

Section 101(a)(1), 29 U.S.C. 411(a)(1) (subjecting the right to vote to "reasonable rules and regulations in the union's constitution"); LMRDA Section 401(e) (subjecting right to run for office to "reasonable qualifications uniformly imposed").

Instead, we believe that the Question Presented is important because section 401(c)'s requirement that unions comply with "all reasonable requests of any candidate" for membership mailings of campaign literature is one of the most important protections for democratic elections that the Act contains. Accordingly, any decision that would in any way undermine that right would be a serious candidate for review by this Court.

3. We also agree with petitioners that the decision in *Donovan v. Carpenters Philadelphia District Council*, 797 F.2d 140 (3d Cir. 1986), follows an analysis that is squarely at odds with the principal analysis of the court of appeals below. Although the decision is factually distinguishable, and indeed supports the preliminary injunction entered in this case, if the differences in analysis were to continue, we would agree that the Court should step in and adopt the approach of the court below here.[2]

Nevertheless, this Court need not resolve the Question Presented at this time. This case represents the first time that any court of appeals has taken a hard look at the statutory language and at the policy considerations that

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[2] We do not agree with petitioners that the analysis in *Marshall v. Meat Cutters Local 274*, 623 F.2d 1322, 1325-1326 (9th Cir. 1980), is contrary to the analysis of the court below. In *Meat Cutters*, the Secretary seemed to have assumed that the rule was reasonable and argued that its application on the particular facts of that case was unreasonable. In considering that argument, the court did state that the Secretary's attempt to focus on the particular application of the rule was inconsistent with the very existence of a rule, *id.*, but the court never focused on the analytic distinction between the reasonableness of the rule and the reasonableness of the request.

support resolution of section 401(c) case in favor of any reasonable request, rather than looking only to the reasonableness of a union's rule. The focus on the union's rule, on the other hand, would permit a court to defer to the union leadership's judgment about what campaign activities by non-incumbents ought to be permitted, although such deference would be inconsistent with Congress' judgment that access for insurgent candidates to the union membership through the membership mailing list was a key form of equalization of campaign resources in order to ensure a fair contested election. The decision below also represents the first time that a court of appeals considering a claim under section 401(c) has acknowledged the need to defer to the statutory interpretation of the Secretary of Labor, which squarely supports the decision below; neither *Carpenters* nor *Meat Cutters* paid any heed to this rule of judicial deference. These differences, coupled with the fact that the Fourth Circuit has ruled *en banc*, while the Third and Ninth Circuit rulings were only by three judge panels, support the view that, if left to their own devices, the courts of appeals may well sort this issue out for themselves and avoid the need for this Court to add it to its own docket.

4. Review is also inappropriate here because the resolution of the "reasonable request" versus "reasonable rule" dispute will not affect the outcome of this case. As we have noted, the district court squarely held that the union's rule barring mailings before the union's convention was itself unreasonable. *Supra* at 4-5. The court of appeals strongly suggested agreement with this holding when it characterized the union's rule as having the "manifest effect" of "delay[ing] the insurgent candidate in beginning his campaign," while the incumbents continue to enjoy the advantages that their exclusive control of the membership lists give them to communicate with both the members and influential local officers: "The advantages . . to the incumbent cannot be questioned." Pet. App. 10a-11a. Thus, the court of appeals recognized that Title IV does not

prevent union officers from monopolizing communications through normal channels throughout their terms of office. Thus, the court concluded, a rule barring mailings before the convention has the unfair effect of perpetuating that monopoly until just before the voting begins.

Certainly the court below did not "preclude consideration" of the union's rule, as petitioners' Question Presented suggests. Thus, even if petitioners persuade the Court that, in considering the reasonableness of a member's request, a lower court must weigh the reasonableness of the union's rule, the result will not be reversal of the preliminary injunction entered in respondent's favor. Accordingly, the court should wait for a case in which the difference in approaches would be decisive, after the issue has been further aired in the lower courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 89-1330 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, ET AL., PETITIONERS

v.

TIMOTHY A. BROWN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Section 401(c) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 481(c), confers a right on a candidate for union office to have campaign literature distributed by the union. The question presented is whether Section 401(c) conditions that right on the reasonableness of the request for distribution, rather than on the reasonableness of a union rule restricting such requests.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1330

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, ET AL., PETITIONERS

v.

TIMOTHY A. BROWN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner International Organization of Masters, Mates and Pilots (the Union) is a labor organization representing workers employed in the maritime industry as ship's officers, as pilots, and in other similar positions. Pet. App. 3a; Pet. 4; Br. in Opp. 1. Petitioners Robert J. Lowen and Elwood Kyser are officers of the Union. Pet. App. 2a; Br. in Opp. 2.

The Union conducts quadrennial elections of officers by mail ballot. Pet. App. 3a. Under the Union's nominating process, any member in good standing is eligible for election, and may be nominated at the nominating conven-

tion. Ballots containing the names of nominees are mailed to Union members within thirty days after the convention, and members are allowed ninety days from mailing to return their ballots. *Ibid.*

Respondent Timothy A. Brown is a member of the Union who sought the office of president during the Union's 1988 election. Pet. App. 2a, 1c; Pet. 6. He wished to distribute campaign literature to Union members at his own expense before the August 1988 nominating convention. Pet. App. 3a-4a; Br. in Opp. 2. Because, as is generally the case, the Union leadership had exclusive access to the membership mailing list, Brown asked the Union to provide mailing labels containing the names and addresses of voting Union members. Pet. App. 4a; Br. in Opp. 3. Brown sought a pre-convention mailing of his campaign literature in order to attract support from other members before they were likely to have committed their votes to other candidates or declared their own candidacy. Br. in Opp. 2. The desirability of an early mailing is heightened in the context of this Union because most of its members work at sea for long periods of time and mail is the only effective means of communicating with them. Br. in Opp. 1-2. An early mailing would also increase the opportunity of Union members to confer and to discuss—for example, at the nominating convention—the issues raised in the mailing. See Pet. App. 5c-6c.

On June 7, 1988, petitioner Kyser denied Brown's request for distribution on the ground that the Union constitution did not authorize the distribution of campaign literature until after the nominating convention, at which a ballot committee and "impartial balloting agency" would be designated as responsible for such distribution. Pet. 6-7; Br. in Opp. 3. Brown appealed this decision to the Union's executive board, which denied the request on July 6, 1988. Br. in Opp. 3.

2. Brown then filed this action in district court, seeking a preliminary injunction directing petitioners to comply with Section 401(c) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 481(c). Section 401(c) requires unions covered by the Act "to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization." Soon after Brown filed suit, the Director of the Department of Labor's Office of Elections, Trusteeships and International Union Audits, who had been furnished with copies of Brown's requests and petitioners' denials, informed the Union that the denials were contrary to the requirements of the Act. Letter from R. Hunsucker to R. Lowen (July 15, 1988); Pet. App. 7a-8a.

On July 25, 1988, the district court ruled that petitioners had violated Section 401(c) by refusing Brown's pre-convention mailing request. Pet. App. 1c-6c. The court therefore issued a preliminary injunction directing petitioners to deliver a set of mailing labels bearing the names and addresses of all Union members to a mutually acceptable mailing service so that Brown's campaign literature could be distributed. Pet. App. 7c-8c.

The district court held that, in determining the lawfulness of a union's refusal to honor a candidate's request to distribute campaign literature, the focus must be on the reasonableness of the request rather than on the reasonableness of the union rule under which the request was denied. Pet. App. 2c-3c. The court found this result mandated by the clear language of the statute, which requires a union "to comply with all reasonable requests of any candidate." *Ibid.* (quoting Section 401(c)). In the district court's view, a court could not give effect to a union rule if "its application results in the rejection of a reasonable request made by a candidate." Pet. App. 3c. In this case,

since Brown's request "to distribute his campaign literature approximately one month before the union's convention is held * * * is clearly reasonable," the court concluded that petitioners had violated the Act by refusing to honor it. *Ibid.*

The court ruled in the alternative that even if the reasonableness of a union's rule governs the LMRDA inquiry, petitioners had violated the Act because the Union rule involved in this case was unreasonable. Pet. App. 4c. The court held that pre-convention communication with Union members was necessary to an effective candidacy so that non-incumbent candidates could have the convention delegates – themselves important leaders of the Union and potential sources of aid in the post-convention election period – consider the merits of a candidacy before the convention. The court found it "virtually impossible" for non-incumbent candidates to elicit needed support at the convention itself without the opportunity in advance to introduce themselves and their ideas by mailings. Pet. App. 4c-5c. The court noted in addition that the nature of Union members' work, which takes them out to sea for long periods of time, "underscores the need for an earlier mailing," since "it is unrealistic to believe that union members will have conferred with one another concerning the merits of the respective candidacies before casting their ballots within the ninety day [election] period." Pet. App. 5c-6c.

3. A divided panel of the court of appeals affirmed the preliminary injunction on the ground that Brown's request for campaign literature distribution before the nominating convention was reasonable. Pet. App. 1a-15a.[1] The majority agreed with the district court that Section 401(c)

[1] The district court had entered a preliminary injunction, but the court of appeals, after noting that the district court's opinion and order "in effect constituted a decision on the merits," "affirm[ed] the decision * * * as one on the merits." Pet. App. 2a-3a.

conditions the right of a candidate to distribution of campaign material solely on the reasonableness of the request, not on the reasonableness of any union rule. Pet. App. 5a-6a. "[M]aking the issue the reasonableness of the union by-law," the court noted, "stands the statute on its head" by "render[ing] union by-laws superior to the congressional mandate and [by] provid[ing] dissident unions with a ready means for nullifying the statute's command." Pet. App. 14a. In addition, the majority observed that its reading accorded with the construction of the statute adopted by the Secretary of Labor, whose "opinion [is] entitled to consideration by this Court and is not to be lightly disregarded." Pet. App. 7a-8a. The court also found the Secretary's construction to be "in clear accord" with Congress's intent to ensure union democracy by moderating the advantages of incumbents who have "exclusive control of the union membership lists" between elections. Pet. App. 8a-9a.

Noting that the Union had made no claim that Brown's request was unreasonable, the majority held that the "manifest result" of denying that request pursuant to the Union's rule would be to favor incumbents. Pet. App. 10a. Because the incumbents had had four years to communicate with Union members and "to cultivate their relations with the local union officers who would be expected to have the greatest influence with the rank and file," the court concluded that "[t]he advantages of the union by-law to the incumbent cannot be questioned." Pet. App. 10a-11a.

The majority in turn rejected the Union's argument that the use of its rule was permissible because it was a reasonable method of satisfying the Act's prohibition against discrimination among candidates with respect to campaign literature distribution. Pet. App. 11a. As the court reasoned, granting Brown's request would not further discrimination because any other candidate for office could assert the same right. Rather, granting the request would "reduce[] the discrimination of exclusive control by

the union incumbents over the electoral lists." Pet. App. 12a.

Finally, the majority recognized that its decision created a conflict with the Third Circuit's decision in *Donovan* v. *Metropolitan District Council of Carpenters*, 797 F.2d 140 (1986), holding that a union's refusal to release mailing labels before a date specified in a union rule was permissible because the rule was a reasonable one. Pet. App. 15a. The court reiterated, however, that its reasoning left it no choice but to disagree with the Third Circuit. *Ibid.*

Judge Hall, in dissent, concluded that any individual request for distribution that conflicts with established union procedures is per se unreasonable unless the union's procedures are shown to be unfair or discriminatory. Pet. App. 16a. He asserted that the majority's approach prevented a request for distribution from being examined within its "underlying factual context." Pet. App. 18a. In addition, he faulted the approach as sanctioning judicial intrusion into internal union affairs, absent an indication that the union had distorted the democratic process. Pet. App. 19a. By contrast, he noted and approved the Third Circuit's decision in *Metropolitan District Council of Carpenters* and the Ninth Circuit's per curiam decision in *Marshall* v. *Provision House Workers Union, Local 274*, 623 F.2d 1322 (1980), which he characterized as holding that "a candidate's compliance with reasonable nondiscriminatory procedures is relevant to whether a mailing request is itself reasonable." Pet. App. 20a.[2]

[2] In *Provision House*, the court upheld as reasonable a union's application of a rule requiring candidates to make requests for distribution of campaign literature within ten days after nominations were received. The Ninth Circuit apparently assumed that the proper focus was on the validity of the union rule; unlike the Third and Fourth Circuits, it did not clearly consider whether the reasonableness of the request rather than the rule should be dispositive.

The Fourth Circuit granted petitioners' suggestion for rehearing en banc; although the Secretary had not participated at earlier stages of the litigation, she filed a brief as amicus curiae supporting respondent and participated in oral argument before the en banc court. The full court adopted the panel majority's opinion affirming the grant of the preliminary injunction and upholding the Secretary's interpretation of Section 401(c). Pet. App. 1b-3b. Judge Hall adhered to his earlier dissent, and Judge Phillips filed a separate dissenting opinion in which he supported Judge Hall's views. Pet. App. 3b-4b.

DISCUSSION

Section 401(c) of the LMRDA provides that a labor organization has a duty to comply with "all reasonable requests" by candidates for union office to distribute their campaign literature to all members of the union in good standing. The court of appeals correctly held that in determining whether a union's refusal to comply with a candidate's request offends this provision, a court should assess the reasonableness of the candidate's request, rather than the reasonableness of the union rule under which the request was denied. Pet. App. 6a, 13a. The court of appeals' holding adheres to the language of the provision, best implements the purposes of the statute, and accords with the interpretation of the Secretary of Labor, who is charged with the enforcement of the Act. However, as the court of appeals (Pet. App. 15a), petitioners (Pet. 15), and respondent (Br. in Opp. 10) acknowledge, the decision squarely conflicts with the holding of at least one other court of appeals. We see little chance that the courts of appeals, one of which decided the issue en banc, will themselves reconcile their diverse approaches. In addition, the issue is of substantial importance to the administration of Title IV of the LMRDA and arises with considerable

frequency. Because continued uncertainty over the proper interpretation of Section 401(c) will inhibit national enforcement of that provision, this Court should grant a writ of certiorari to resolve the issue.[3]

1. The court of appeals' conclusion is directed by the text of Section 401(c). That section provides in relevant part (emphasis added):

> Every national or international labor organization, * * * and every local labor organization, and its officers, *shall be under a duty*, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, *to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candiate's expense campaign literature in aid of such person's candidacy* to all members in good standing of such labor organization * * *.

Section 401(c) thus imposes an obligation on unions to distribute campaign literature at a candidate's expense in response to "all reasonable requests of any candidate."[4]

[3] On July 28, 1988, the day it heard oral argument, the panel issued an order denying petitioners' application for a stay of the preliminary injunction; petitioners thereafter complied with Brown's distribution request. The union subsequently conducted its election and Brown lost the election by a small margin. However, the propriety of that election has been challenged by the Secretary on a number of other grounds, and if a rerun election is necessary, Brown anticipates that the distribution issue will arise again. *Dole* v. *International Organization of Masters, Mates and Pilots*, No. MJG-89-2071 (D. Md.); Br. in Opp. 7 n.1. In addition, Brown has represented that he will seek to exercise the same right in the Union's next regularly scheduled election. *Ibid.* We therefore agree with the parties that, because the controversy is capable of repetition yet evading review, the en banc court had, and this Court has, jurisdiction to consider this matter. See *Ibid.*

[4] A union member need not be formally nominated in order to be a bona fide candidate entitled to exercise Section 401(c) rights. 29 C.F.R. 452.80; see *Yablonski* v. *UMW*, 71 L.R.R.M. 2606 (D.D.C. 1969).

The meaning of the provision is clear: it "conditions the right of the contesting union office seeker to have his campaign material distributed only on the *reasonableness of his request.*" Pet. App. 5a (emphasis added).

When Congress wanted the courts to focus on the reasonableness of union rules, it knew how to say so. Elsewhere in the LMRDA, Congress expressly identified the circumstances in which it intended reasonable union rules to control a union member's rights. See, *e.g.*, Section 401(e), 29 U.S.C. 481(e) ("every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed)"); Section 101(a)(1), 29 U.S.C. 411(a)(1) (providing union members with equal rights and privileges to nominate candidates, to vote in elections or referendums, to attend union meetings and to participate in deliberations and voting at such meetings, "subject to reasonable rules and regulations in [a labor organization's] constitution and bylaws"); Section 101(a)(2), 29 U.S.C. 411(a)(2) (providing union members with rights to free speech and assembly "subject to the organization's established and reasonable rules pertaining to the conduct of meetings"). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987); see also *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 109 (1980).

The structure of the statute supports the court of appeals' reading of Section 401(c). Section 401(c)'s requirement is the only obligation imposed under Title IV that is enforceable by private suit. Moreover, candidates need

not exhaust internal union remedies, or await the completion of the election (or the failure to hold an election within the statutorily prescribed time) before seeking relief. Compare 29 U.S.C. 482, 483; see *Local No. 82, Furniture & Piano Moving* v. *Crowley*, 467 U.S. 526, 539-540 & n.15 (1984); *Dunlop* v. *Bachowski*, 421 U.S. 560, 566-567 (1975). The other obligations imposed by Title IV are subject to such requirements in order to assure unions a "maximum amount of independence and self-government" by giving them every opportunity to correct their errors. S. Rep. No. 187, 86th Cong., 1st Sess. 21 (1959); *Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 472-473 (1968). By contrast, Congress in Section 401(c) provided aggrieved candidates with a unique device immediately and directly to vindicate their basic right to disseminate information to the union electorate. Thus, by its enforcement mechanism as by its terms, Section 401(c) sharply limits union prerogatives in favor of the rights of individual union members.

2. The court of appeals' straightforward reading of the statute also best implements the provision's purpose.

a. "The basic objective of Title IV * * * is to guarantee 'free and democratic' union elections modeled on 'political elections in this country.'" *Local 3489, United Steelworkers* v. *Usery*, 429 U.S. 305, 309 (1977) (quoting *Wirtz* v. *Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 504 (1968)); see also *Glass Bottle Blowers Ass'n*, 389 U.S. at 470; *id.* at 475 (Act designed to protect "vital public interest" in free and democratic union elections). Faced with revelations of union corruption, dictatorial practices, and racketeering, Congress determined "to protect the rights of rank-and-file members to participate fully in the operation of their union through processes of democratic self-government, and, through the election process, to keep the union leadership responsive to the membership." *Hotel Employees*, 391 U.S. at 497.

The ability of a candidate to communicate with union members through distribution of campaign literature is central to a free and democratic election process. Only if a candidate is able to speak to the rank and file in an effective manner will union members be able to make the informed choice that Congress viewed as critical to union democracy. Thus, it is not surprising that the provision enacted as Section 401(c) came to the floor of Congress as part of a package designed as a "Bill of Rights" for union members.[5] Congress's emphasis in Section 401(c)—as it demonstrated by making the section enforceable by a private right of action (see pp. 9-10, *supra*)—was to provide safeguards that could not be moderated by those controlling the unions.

Moreover, in enacting Section 401(c), Congress specifically recognized that challengers were at a severe disadvantage vis-a-vis incumbents who had long had access to union membership lists and had for years been able to communicate with union members on a regular basis through official union channels.[6]

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[5] See 105 Cong. Rec. 6717 (1959) (statement of Sen. Kuchel), *reprinted in* 2 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 1229-1230; [hereinafter *Leg. Hist.*]; 105 Cong. Rec. 6721 (1959) (statement of Sen. Javits), 2 *Leg. Hist.* 1238; 105 Cong. 6728 (1959) (statement of Sen. Javits), 2 *Leg. Hist.* 1240; 105 Cong. Rec. 6729 (1959) (statement of Sen. Clark), 2 *Leg. Hist.* 1242.

[6] The language substantially enacted as Section 401(c) was introduced by Senator Javits (105 Cong. Rec. 6727-6728 (1959), 2 *Leg. Hist.* 1240) to replace an earlier "Bill of Rights" amendment to S. 1555, 86th Cong., 1st Sess. (1959), introduced by Senator McClellan (105 Cong. Rec. 6475-6476 (1959), 2 *Leg. Hist.* 1102). Senator McClellan voiced the concern that the Javits amendment might be less effective than the McClellan amendment in restricting the power of

By contrast, the standard advocated by petitioners—approving denials of distribution requests based on "reasonable" union rules—meets none of these congressional concerns. The proposed standard, instead of recognizing an individual right for the courts to apply independently, by its very terms defers to existing union rules. To require only that rules controlling distribution requests be "reasonable" (rather than that the requests themselves meet that standard) would inevitably favor the current union leadership, and would thus undermine Congress's purpose of moderating the incumbent's advantage.

Nor does the legislative history of Section 401(c) suggest that union rules should play a dispositive role in the inquiry. To the contrary, the Senate report (concerning language similar to that later introduced on the floor) and the Conference report simply reiterate the duty of unions to comply with the "reasonable requests" of candidates. See S. Rep. No. 187, *supra*, at 46 ("Local unions and their officers are forbidden to discriminate in favor of or against any candidate for union office with respect to the use of the union's list of members in good standing and are required to comply with *all reasonable requests* of any

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"incumbent officers" who are "able to perpetuate themselves in office" by use of membership lists:

> The one who was in office would know how to line up his forces, and so forth; but a candidate who was not in office would not have a [membership] list and would not have all that information. This amendment would simply permit him to send his campaign material to the union and have the union mail it out.

105 Cong. Rec. 6728 (1959), 2 *Leg. Hist.* 1240. Senator McClellan was assured by Senator Javits that in such circumstances the complementary clause of Section 401(c) that prohibits discrimination in the use of membership lists would assure a candidate the right to obtain a membership list if necessary to cure the discrimination. 105 Cong. Rec. 6728 (1959), 2 *Leg. Hist.* 1241.

candidate for distribution of his campaign literature by the unions, but at the candidate's expense, to members in good standing on the union's roster of members.") (emphasis added); H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 33 (1959) ("Subsection (b) of section 401 of the Senate bill [adopted by the Conference Committee] contains a provision making it the duty of each union and its officers to comply with *reasonable requests* of candidates to distribute, at the candidates' expense, campaign literature to all members of the union") (emphasis added). This Court has rejected giving a "broad reach" even to those provisions of Title IV, such as Section 401(e), that explicitly cede authority to union rulemaking. *Local 3489*, 429 U.S. at 309; *Hotel Employees*, 391 U.S. at 499. *A fortiori*, it is not proper to stretch the language of Section 401(c) to imply such authority.

b. Petitioner argues (Pet. 12) that the "reasonable rule" standard better serves Congress's desire to minimize governmental interference with union self-governance. Petitioner is mistaken on several counts.

First, while Congress recognized that "[a] strong independent labor movement is a vital part of American institutions," it determined that "[n]evertheless, effective measures to stamp out crime and corruption and guarantee internal union democracy, cannot be applied to all unions without the coercive powers of government." S. Rep. No. 187, *supra*, at 5, 6; H.R. Rep. No. 741, 86th Cong., 1st Sess. 6 (1959); see also S. Rep. No. 187, *supra*, at 20. Second, Congress also determined that establishing certain critical protections for individual union members would *itself* minimize governmental interference into union affairs. "Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs." S. Rep. No. 187, *supra*, at 7; see also *id.* at 19-21; H.R. Rep. No. 741, *supra*, at 15-16. This

theme is reflected in provisions of Title I, the "Bill of Rights" for union members. *Hotel Employees*, 391 U.S. at 497-498. But "Title IV, and particularly § 401, was the vehicle by which Congress expressed its policy." *Id.* at 498. As this Court has put it,

> Congress did not saddle the courts with the duty to search out and remove improperly entrenched union leaderships. Rather, Congress chose to guarantee union democracy by regulating not the results of a union's electoral procedure but the procedure itself. Congress decided that if the elections are "free and democratic," the members themselves are able to correct abuse of power by entrenched leadership.

Local 3489, 429 U.S. at 311-312. In short, it was Congress's judgment that the federal interest in avoiding undue intervention into internal union matters is furthered by stringent enforcement of union members' basic rights as they are articulated in Section 401. See also *Glass Bottle Blowers Ass'n*, 389 U.S. at 471 ("[T]he freedom allowed unions to run their own elections was reserved for those elections which conform to the democratic principles written into § 401."); accord *Hotel Employees*, 391 U.S. at 496-497.[7]

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[7] Petitioner also suggests (Pet. 16-18) that the court of appeals erred because imposition of uniform union rules governing literature distribution would lessen the opportunity for unions to discriminate among candidates. But Section 401(c) contains an explicit prohibition against union discrimination in responding to candidates' literature distribution requests, and union members therefore are protected from disparate application of the "reasonable request" standard. See also 29 C.F.R. 452.67. Moreover, as the court of appeals held, "[t]here is no conceivable way in which the granting of plaintiff's request will work a discrimination against any other union members" because "any candidate, whether an incumbent or an insurgent, has the same rights as the plaintiff." Pet. App. 12a-13a.

3. As the court below noted, the Secretary of Labor, who has the authority to enforce the provisions of Title IV, including Section 401(c), consistently has interpreted the statute as requiring unions to comply with all reasonable requests for distribution. See 29 C.F.R. 452.67 ("[t]he Act imposes the duty on the union to comply with *all reasonable requests* of any candidate to distribute his campaign literature to the membership at his expense") (emphasis added);[8] 29 C.F.R. 452.69 (providing that "a union and its officers must honor a candidate's request for distribution where the candidate is willing and able to bear the expense of such distribution"); see also 29 C.F.R. 452.79, 452.80. In this case, the Director of the Office of Elections, Trusteeships and International Audits of the Department of Labor advised petitioners by letter that the Union's denial of respondent's request appeared to be unlawful. Pet. App. 7a-8a.

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[8] Judge Hall is incorrect in suggesting (Pet. App. 21a n.2) that the Secretary's position is inconsistent with the provision of Section 452.67 that "[i]n order to avoid charges of disparity of treatment among candidates, it is advised that a union inform all candidates in advance of the conditions under which distribution will be made and promptly advise them of any change in those conditions." As the district court aptly noted (Pet. App. 3c), "although a union certainly may – indeed should – adopt a rule known to all candidates in advance setting forth the terms and conditions under which campaign literature will be distributed by the union, in evaluating the validity of the rule a court must inquire not simply whether the rule may be said to be 'reasonable' but whether its application results in the rejection of a reasonable request made by a candidate." Neither the Secretary nor the court of appeals has said that union rules are impermissible, only that unions must draft them in such a way that reasonable requests by candidates will be honored. In assessing the reasonableness of a request, a reviewing court may consider the union's concerns as expressed in the union rule, along with other factors such as the geographic size of the union, the size of the union membership, the type of election (direct referendum or delegate), and the timing of the candidate's request.

This Court has consistently recognized the "special knowledge and discretion" of the Secretary in the administration of Title IV. *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964); see *Local 3489*, 429 U.S. at 313; *Glass Bottle Blowers Ass'n*, 389 U.S. at 473; see also S. Rep. No. 187, *supra*, at 34 (noting that the LMRDA "endows the Secretary of Labor with broad power to insure effectuation of its objectives"). The court of appeals thus correctly concluded that the Secretary's view was entitled to deference. See, *e.g.*, *Donovan* v. *National Transient Division, International Brotherhood of Boilermakers*, 736 F.2d 618, 621 (10th Cir. 1984) (deference is owed to Secretary's LMRDA interpretation "unless there are compelling indications that it is wrong"), cert. denied, 469 U.S. 1107 (1985); accord, *BLE International Reform Committee* v. *Sytsma*, 802 F.2d 180, 188 (6th Cir. 1986); see also, *e.g.*, *Donovan* v. *Sailors' Union*, 739 F.2d 1426, 1429 (9th Cir. 1984), cert. denied, 471 U.S. 1004 (1985). While we believe the language of the statute is itself dispositive, the Secretary's interpretation is, at the very least, "based on a permissible construction of the statute" and should be given effect. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

4. Although the decision below is correct, there is a direct conflict among the circuits on the standard for determining a union's obligation to distribute campaign literature under Section 401(c). In *Donovan* v. *Metropolitan District Council of Carpenters*, 797 F.2d 140, 143 (1986), the Third Circuit expressly rejected the Secretary's position that "the district court [had] erred in focusing on the reasonableness of the [union's] *rule* governing requests to distribute literature, rather than on the reasonableness of the request itself." In that case, a candidate for the office of union president asked the union to distribute his campaign literature; the union denied the request on the ground that it was premature under a union

rule providing that campaign distribution requests would be honored only after a certain date (five weeks before ballots were mailed to union members and seven weeks before they were returnable). 797 F.2d at 144. The district court found that it would not interfere with union business to permit a candidate access to the mailing list for distribution purposes before the date established by the union rule. *Id.* at 141-142. The court focused, however, on its determination that the union rule was reasonable, and concluded that the union had therefore not violated the Act in denying the request. *Id.* at 141-142; 143-144. The court of appeals affirmed, ruling that a union may adopt and enforce reasonable, non-discriminatory rules for the distribution of campaign literature. *Id.* at 144. In its view, a focus on the union rule rather than on the candidate's request was proper because permitting the imposition of uniform union rules "avoids even the appearance of disparate treatment" in responding to literature distribution requests. *Ibid.* In addition, the court concluded, such a focus furthers the policy of minimim governmental encroachment on union autonomy by "minimizing judicial second-guessing." *Ibid.*

The present decision is also in considerable tension, if not direct conflict, with another case, *Marshall* v. *Provision House Workers Union, Local 274*, 623 F.2d 1322 (9th Cir. 1980). The district court in *Provision House* ruled that the union "did not fail to comply with reasonable requests [by the challengers]" when it refused campaign literature distribution requests that were untimely under a union rule requiring that such requests be made within ten days of the nominating meeting. 623 F.2d at 1324. The court of appeals rejected the Secretary's argument that because the rule had been unreasonably applied, distribution requests that violated the rule were not necessarily unreasonable. *Id.* at 1325. The court did not specifically discuss the distinction between a standard that focuses on the reasonableness of the request and one that focuses on

the reasonableness of a union rule. Nevertheless, it accepted the district court's determination that enforcement of the union rule was necessary because exceptions would undercut the purpose of the rule "to eliminate the potential for discrimination among candidates by establishing a uniform set of standards governing all candidates." *Id.* at 1326.

5. The ability of candidates to distribute campaign literature—the only effective method of communicating with the rank and file—is an essential part of Title IV's mandate of free and open union elections. The standard governing the distribution requirement is therefore of central importance to the statutory scheme. Furthermore, complaints alleging unlawful denials of campaign literature distribution requests arise with some frequency. We have been informed that since January 1, 1987, the Department of Labor's Office of Labor-Management Standards has received approximately 15 complaints of unlawful refusal to distribute campaign literature and has filed seven lawsuits alleging such violations. The differing judicial standards for resolving these complaints create uncertainty and inhibit uniform national enforcement. These factors weigh heavily in favor of review.

Notwithstanding the importance of the issue, respondent argues against certiorari principally on the grounds that the decision below is correct, that the question presented could benefit from further development in the courts of appeals, and that the court of appeals' judgment could be upheld even under the more restrictive standard advocated by petitioners. Although these arguments are not without some force, they are outweighed by the benefits of immediate review by this Court.

First, while continued debate in the courts of appeals may further elaborate the issue, the decisions of the Third and Fourth Circuits are fully reasoned. In our view, they furnish more than a sufficient basis for the immediate re-

view by this Court that the importance of the issue warrants. Second, there is no reason to believe that the Third Circuit will retreat from its current position, and the en banc Fourth Circuit has for its part clearly stated its view to the contrary. Thus, while the district court in this case did hold in the alternative that the Union rule was unreasonable, the court of appeals did not rely on that alternative holding and has established en banc circuit precedent endorsing the "reasonable request" standard. Accordingly, we believe this is an appropriate case in which to resolve the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

CHRISTINE DESAN HUSSON
Assistant to the Solicitor General

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MAY 1990

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(4)

No. 89-1330

Supreme Court, U.S.
FILED
AUG 10 1990
JOSEPH E. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, *et al.*,
Petitioners,

v.

TIMOTHY A. BROWN,
Respondent.

On Writ of Certiorari to the Court of Appeals for the Fourth Circuit

---

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED FEBRUARY 15, 1990
CERTIORARI GRANTED JUNE 18, 1990

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2876

TIMOTHY BROWN,
Plaintiff-Appellee,

v.

ROBERT J. LOWEN; F. ELWOOD KYSER;
INTERNATIONAL ORGANIZATION OF MASTERS,
MATES AND PILOTS,
Defendants-Appellants.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
7/26/88	Civil case docketed. (kac)
7/26/88	Memorandum in support [1070325-1] of motion for stay pending appeal [1070293-1] filed by Appellant International Organ, Appellant F. Elwood Kyser, Appellant Robert J. Lowen. [88-2876] (kac)
7/26/88	Oral motion filed directly with HLW by Appellant International Organ, Appellant F. Elwood Kyser, Appellant Robert J. Lowen to expedite oral argument. [88-2876] (kac)
7/26/88	Oral court order filed by HLW mooting motion for stay pending appeal [1070293-1], granting motion to expedite oral argument [1070349-1]—simultaneous informal briefs are to be filed by 07/28/88. [88-2876] (kac)
7/27/88	Case calendared for oral argument. [88-2876] (ski)

DATE	PROCEEDINGS
7/28/88	Court order filed by DSR, Authoring Judge, HEW, KKH, Dissenting Judge denying motion for stay pending appeal [1070293-1] Copies to all counsel. [88-2876] (kac)
7/28/88	Oral argument heard. Courtroom Deputy: dad. [88-2876] (ca)
7/28/88	Brief filed by Appellant. Type of Service: Fax Machine Copies of brief: 4 # pages. 24. Sufficient [Y/N]: y. [88-2876] (wtc)
7/28/88	Brief filed by Appellee. Type of Service: Fam Machine Copies: 4 # pages: 37. Sufficient [Y/N]: y. [88-2876] (wtc)
7/28/88	Informal brief filed by Appellee Timothy A. Brown [1134900-1] [88-2876] (kac)
9/14/88	Published authored opinion filed. Panel: DSR, Authoring Judge, HEW, KKH, Dissenting Judge; Decision: affirmed [88-2876] (kac)
9/14/88	Judgment order filed. [88-2876] (kac)
9/28/88	Petition filed by Appellant International Organ, Appellant F. Elwood Kyser, Appellant Robert J. Lowen for rehearing [1147250-1], for suggestion for rehearing in banc [1147250-2] [88-2876] (kac)
10/31/88	Federal Reporter Citation: 857 F.2d 216. [88-2876] (jle)
11/14/88	Response [1163898-1] to motion for rehearing [1147250-1], motion for suggestion for reh in banc [1147250-2] filed by Appellee Timothy A. Brown. [88-2876] (kac)
1/11/89	Court order filed DSR granting motion for rehearing [1147250-1], granting motion for suggesting for reh in banc [1147250-2] Copies to all counsel. [88-2876] (kac)
1/11/89	Case reopened. [88-2876] (kac)

DATE	PROCEEDINGS
1/20/89	Informal brief filed by Appellant International Organ, Appellant F. Elwood Kyser, Appellant Robert J. Lowen [1186144-1] [88-2876] (AN ORIGINAL AND 11 EXTRA COPIES AS REQUESTED IN ORDER ENTERED ON (1/11/89) (kac)
1/27/89	Motion filed by Potential Amicus Curiae Secretary of Labor to file amicus brief [1188680-1] (88-2876] (kac)
1/30/89	Corrected motion filed by Amicus Curaie Secretary of Labor to file amicus brief [1188865-1] [88-2876] (sn)
2/1/89	Response [1190105-1] to motion to file amicus brief [1188680-1], motion to file amicus brief [1188865-1] filed by Appellant. [88-2876) (sn)
2/3/89	Court order filed by HLW granting motion to file amicus brief [1188680-1], granting corrected motion to file amicus brief [1188865-1]—amicus brief shall be served and filed on or before 3-2-89 and the appellants may file a response to the amicus brief on or before 3-23-89. Copies to all counsel. [88-2876] (kac)
3/1/89	Amicus curiae brief filed by Amicus Curiae Secretary of Labor. Type of Service: CS Copies of brief: 12. Sufficient [Y/N]. y. [88-2876] (wtc)
3/2/89	Case calendared for oral argument. [88-2876] (ski)
3/13/89	Federal Reporter Citation: 865 F.2d 1444. [88-2876] (st)
3/20/89	Motion filed by Appellee Timothy A. Brown requesting separate oral argument [1207137-1] [88-2876] (wants to divide oa with amicus counsel) (kac)

DATE	PROCEEDINGS
3/31/89	Response [1211477-1] to motion requesting separate oral argument [1207137-1] filed by Appellant International Organ, Appellant F. Elwood Kyser, Appellant Robert J. Lowen. [88-2876] (kac)
3/31/89	Court order filed by SJE granting motion requesting separate oral argument [1207137-1] Copies to all counsel. [88-2876] (kac)
4/10/89	Oral argument heard. Courtroom Deputy: dad. [88-2876] (dad)
11/17/89	Published per curiam opinion filed. [88-2876] (kac)
11/17/89	Judgment order filed. Terminated on the Merits after Oral Hearing; Affirmed; Written, Unsigned, Published. Heard en banc; DSR, Authoring Judge; JDP, Dissenting Judge; KKH, HLW, HEW, FDM, JMS, SJE, RFC, JHW, WWW. [88-2876] (kac)
11/22/89	Bill of costs filed by Appellee Timothy A. Brown. [88-2876] (rm)
1/5/90	Federal Reporter Citation: 889 F.2d 58. [88-2876] (ejm)
1/25/90	Mandate issued. [88-2876] (rm)
1/25/90	Bill of costs taxed by clerk in the amount of $54.00; cc to attorney for Appellee. [88-2876] (rm)
2/26/90	Supreme Court notice received of filing of petition for certiorari on 02/15/90. Supreme Court No. 89-1330. [88-2876] (rm)
6/21/90	Supreme Court order granting certiorari received. Supreme Court no. 89-1330 filed in Supreme Court on 06/18/90. [88-2876] (ch)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Case No. JFM 88-1994

TIMOTHY BROWN,
Plaintiff,

v.

ROBERT J. LOWEN, F. ELWOOD KYSER and
INTERNATIONAL ORGANIZATION OF MASTERS,
MATES, AND PILOTS,
Defendants.

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1988		
July 11	1	Complaint.
July 11	2	Motion of Plaintiff for a Preliminary Injunction, Memorandum, Affidavit (BROWN) and Exhibits A-H & PROPOSED Order. (c/s)
July 12	3	Summons issued. (SERVED: IOMMP—7/17/88—see #6)
July 20	4	Motion of Plaintiff for a Temporary Restraining Order, Attachments, Exhibits A-I, Affidavit & PROPOSED Temporary Restraining Order. (c/s—Howard, J.—chambers Judge)
July 21	5	Memorandum of Defendants' in Opposition to Motion of Plaintiff for Preliminary Injunction, Affidavits (2) & Exhibits A-G. (c/s)
July 25	6	Affidavit of service.

DATE	NR.	PROCEEDINGS
1988		
July 25	—	Hearing on Motion of Plaintiff for Temporary Restraining Order held before (Motz, J)—Motion "GRANTED"—for reasons stated in open Court. (Order to be submitted by the Court) (Tape: Staffer)
July 26	8	Order (Motz, J.) dated 7/25/88, that Defendant's shall within forty-eight hours deliver a set of Cheshire labels bearing the names and addresses of all members of the IOMMP who are eligible to vote in upcoming election of officers to a mailing service, as set forth; and that Plaintiff shall pay to Defendant IOMMP $100 for the cost of preparing a set of mailing labels. (cc's hand del'd in court 7/25/88) (EOD 7/26/88 gez)
July 26	9	Memorandum (Motz, J.) dated 7/26/88, that preliminary injunction was entered in favor of Plaintiff and that this injunction is stayed pending Defendants' appeal to the Fourth Circuit, as therein more particularly set forth. (c/m by chambers) (EOD 7/26/88 gez)
July 26	10	Notice of Appeal of Defendants. (d/s and topf furnished 7-26-88 bmh) (NOA mailed 7-26-88 bmh)
July 26	—	Record on Appeal transmitted to Judge Russell (4CCA—Spartansburg, S. C.) at the request of Judge J. Frederick Motz. (File—Vol. I sent Express Mail)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civ. No. HAR 88-1994

TIMOTHY A. BROWN,
Plaintiff,

v.

ROBERT J. LOWEN, F. ELWOOD KYSER, and INTERNATIONAL ORGANIZATION OF MASTERS, MATES, AND PILOTS,
Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under section 401(c) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 481(c), in which a member of the International Organization of Masters, Mates and Pilots (IOMMP") who is running for union office against the incumbent President seeks to enforce his statutory right to have his union mail, at the member's own expense, a statement in support of his candidacy. The union has refused to send out his mailing until after the union's convention, at which time plaintiff must already have been nominated and the ballots will be about to be mailed to the union membership. Because plaintiff desires to begin the debate about his candidacy before the convention begins, he seeks a Court order directing defendants to allow him to do the mailing immediately.

2. The Court has jurisdiction of this action under 28 U.S.C. §§ 1331 and 1337, and 29 U.S.C. 481(c).

Parties

3. Plaintiff Timothy A. Brown is a member of defendant IOMMP.

4. Defendants Robert J. Lowen and F. Elwood Kyser are the International President (and chief executive officer), and the International Secretary-Treasurer, respecttively, of the IOMMP, and have their principle place of business in Linthicum Heights, Maryland. The International Organization of Masters, Mates and Pilots is a labor organization whose principal office is loctaed in Linthicum Heights, Maryland. The IOMMP is governed by a General Executive Board ("GEB"), which consists of the President, Secretary-Treasurer, Executive Vice-President, and several Vice-Presidents.

Facts

5. The IOMMP's membership consists of approximately 8000 individuals who work as ship's officers and pilots and in similar positions. Almost all members spend their working lives on board ship, and are often away from home for long periods of time.

6. Plaintiff Brown has announced his candidacy for International President of IOMMP, in opposition to defendant Lowen. That election will take place during the regular election of IOMMP officers which is scheduled to be held in 1988.

7. Under the IOMMP Constitution, in order to be nominated to run in the 1988 election, Brown must either have his name placed in nomination by a delegate to the IOMMP Convention, which is scheduled to begin on August 22, 1988, or must obtain signatures of at least fifty members on a nominating petition, which must be received by the International Secretary-Treasurer before the time the Chairman of the Convention declares nominations to be closed.

8. Plaintiff Brown wants to encourage the membership to begin consideration of his candidacy and of the

issues he hopes to raise during his campaign before the deadline for making nominations, both in orde. to persuade the membership that he should be nominated and elected, and to attract support from individuals who might otherwise be inclined to run for office themselves or to encourage other members to do so.

9. Accordingly, on May 9, 1988, Brown notified defendant Kyser of his intent to run for office, and requested permission to send a mailing to the union membership in support of his candidacy. Toward that end, he asked Kyster to deliver the union's mailing list to a mailing service and to provide him with information about the cost of the mailing.

10. On June 2, 1988, Brown had not yet received a response to this request. Accordingly, by letter of that date, he forwarded his request to defendant Lowen, with a copy of his previous letter to Kyser, and indicated that he wished to be able to do a mailing by July 5, 1988. On June 7, 1988, defendant Kyster replied that no mailings would be possible until after the completion of the Convention and the selection of an "Impartial Balloting Agency."

11. By letter dated June 15, 1988, Brown appealed to the GEB from Kyser's refusal to allow a mailing before the convention and reiterated his desire to have his first mailing done by July 5, 1988. In addition, Brown specified that the mailing service selected by the union should be provided with Cheshire labels, which can be affixed by machine and therefore minimize the expense of the mailing. Although the IOMMP is capable of producing its mailing list in this fashion, the GEB denied Brown's request on July 6, 1988.

12. Because of the nature of the work of the members of the IOMMP, communications through the mailing list and through the union newspaper, which is controlled entirely by the incumbers, are the only effective means by

which plaintiff Brown can persuade his fellow members that he ought to be nominated and elected as the International President of the IOMMP.

13. By refusing to comply with their statutory duty to provide plaintiff Brown with the requested mailing labels so that he can convey his views to the membership of the IOMMP, defendants are causing plaintiff irreparable injury, and will not cease doing so unless they are enjoined by this Court.

Cause of Action

14. By refusing plaintiff's reasonable request that he be permitted to do a mailing to the union membership at the time of his choosing, defendants have violated section 401(c) of the LMRDA, 29 U.S.C. § 481(c).

WHEREFORE, PLAINTIFF PRAYS THE COURT TO ENTER JUDGMENT AND ORDER:

A. Declaring that defendants have violated section 401(c) of the LMRDA, 29 U.S.C. § 481(c);

B. Preliminarily and permanently enjoining defendants to furnish its mailing list, printed on Cheshire labels, to a mailing service selected by plaintiff Brown, so long as Brown pays for the cost of producing the labels;

C. Awarding plaintiff and his counsel their reasonable costs and attorney fees; and

D. Awarding such other relief as may be just and proper.

Respectfully submitted,

/s/ Paul Alan Levy
PAUL ALAN LEVY
(D.C. Bar 946400)

/s/ Arthur L. Fox II
ARTHUR L. FOX II
(Trial Bar 01532)

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July 11, 1988

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civ. No. ——

TIMOTHY A. BROWN,
Plaintiff,

v.

ROBERT J. LOWEN, F. ELWOOD KYSER, and INTERNATIONAL ORGANIZATION OF MASTERS, MATES, AND PILOTS,
Defendants.

AFFIDAVIT OF TIMOTHY A. BROWN

---

1. My name is Timothy A. Brown. I am a member of the International Organization of Masters, Mates and Pilots ("IOMMP"), and this affidavit is submitted in support of my attempt to obtain relief in this case.

2. Defendants Robert J. Lowen and F. Elwood Kyser are the International President and chief executive officer, and the International Secretary-Treasurer, respectively, of the IOMMP, and have their principal place of business in Linthicum Heights, Maryland. The International Organization of Masters, Mates and Pilots is a labor organization whose principal office is located in Linthicum Heights, Maryland. The IOMMP is governed by a General Executive Board ("GEB"), which consists of the President, Secretary-Treasurer, Executive Vice President, and several Vice-Presidents.

3. The IOMMP's membership consists of approximately 8000 individuals who work as ship's officers and pilots and in similar positions. Almost all members spend their working lives on board ship, and are often away from home for long periods of time.

4. I have announced my candidacy for International President of IOMMP, in opposition to defendant Lowen. That election will be held during the regular election of IOMMP officers which is scheduled to begin in the late summer of 1988. As of this date, I meet the eligibility requirements for this position.

5. Under the IOMMP Constitution, a copy of which is attached as Exhibit A, in order to be nominated to run in the 1988 election, I must either have my name placed in nomination by a delegate to the IOMMP Convention which is scheduled to be held on August 22-24, 1988, or must obtain signatures of at least fifty members on a nominating petition which must be received by the International Secretary-Treasurer before the time the Chairman of the Convention declares nominations to be closed. Under the Constitution, the ballots may be mailed out as soon as ten days after the end of the Convention, and they must be mailed out within thirty days of that time; normally the ballots have been mailed closer to ten than to thirty days after the Convention.

6. Because of the fact that the members of the IOMMP are generally at sea, communications through the mailing list and through the union newspaper are the only effective means by which I can persuade my fellow members that I ought to be nominated and elected as the International President of the IOMMP.

7. The officers of the IOMMP control the union's newspaper, which is the principal and only regular source of news which members have about union affairs. Although theoretically the Constitution requires that the newspaper be open to all points of view, as a practical matter the "editorial board"—*i.e.*, the union officers—

screen out any membership contributions that are deemed "political." This screening process does not stop them, however, from using the newspaper to promote their own views of the problems facing the union.

8. Because members are subject to this steady barrage of information favoring the policies espoused by the incumbents, it is not enough for me to be able to do a single mailing to the membership at the time the ballots are mailed out. Instead, I wish to be able to start discussing the issues that I deem important now, before nominations and before the convention, so that by the time the ballots arrive the membership will have more information on my side of the story on which to base a decision.

9. I want to encourage the membership to begin consideration of my candidacy and of the issues I hope to raise during his campaign before the deadline for making nominations, both in order to persuade the membership that I could be nominated and elected, and to attract support from individuals who might otherwise be inclined to run for office themselves or to encourage other members to do so.

10. Because so many members spend long periods of time away from home, and thus may not see the mail which has been sent to them for quite some time after it reaches their homes, a lengthy period is allowed by the IOMMP Constitution for the return of the ballots following the date on which they are first mailed to the membership. This lengthy period for balloting does not lessen my need to communicate my campaign messages now, however. I vote my ballots immediately after seeing them, and I understand and believe that other members do likewise. I am therefore concerned that, by the time they see the ballots, many members will already have made up their minds for whom to vote. I want to be sure that the members have already learned about my views, and perhaps been spurred to discuss them with other members in the course of their work, before they see their ballots.

11. Accordingly, on May 9, 1988, I notified defendant Kyser of my intent to run for office, and requested permission to send a mailing to the union membership in support of my candidacy. Toward that end, I asked Kyser to deliver the union's mailing list to a mailing service and to provide me with information about the cost of the mailing. A copy of this letter is attached as Exhibit B.

12. On June 2, 1988, I had not yet received a response to this request. Accordingly, by letter of that date, a copy of which is attached as Exhibit C, I forwarded my request to defendant Lowen, with a copy of my previous letter to Kyser, and indicated that I wished to be able to do a mailing by July 4, 1988. On June 7, 1988, defendant Kyser replied that no mailings would be allowed until after the completion of the Convention and the selection of an "Impartial Balloting Agency." A copy of Kyser's reply is attached as Exhibit D.

13. On June 15, 1988, a copy of which letter is attached as Exhibit E, I appealed to the GEB from Kyser's refusal to allow a mailing before the convention and reiterated my desire to have my first mailing done by July 5, 1988. In addition, I specified that the mailing service selected by the union should be provided with Cheshire labels, which can be affixed by machine and therefore minimize the expense of the mailing. It is my understanding that on July 6, 1988, the GEB denied this request, although I have not yet received formal notification of that decision.

14. By refusing to comply with their statutory duty to assist me in communicating his views to the membership by use of the mailing list, defendants are causing me irreparable injury.

Pursuant to 28 U.S.C. § 1746, I hereby certify that the foregoing is true and correct. Executed on July 8th, 1988.

/s/ Timothy A. Brown
TIMOTHY A. BROWN

Excerpts from BROWN *v.* LOWEN
BROWN AFFIDAVIT, EXHIBIT A

CONSTITUTION

of the

International Organization

of

Masters, Mates & Pilots

[SEAL]

This Constitution has been voted for by more than the necessary two-thirds majority pro rata vote of the Delegates to the 64th Convention (Constitutional) of the International Organization of Masters, Mates & Pilots. It has been approved for submission to the membership for ratification by referendum by the Labor Management Services Administration of the United States Department of Labor, and the Honorable Judge Constance Baker Motley of the United States Federal District Court, Southern District of New York.

* * * *

Article IV

CONVENTIONS

Section 1. *Authority and Power of Conventions*

The authority and power of this Organization is vested in the members thereof acting by and through their duly elected delegates meeting in Convention assembled.

Such Convention is the source of all true and legitimate authority over the Organization and possesses as such supreme and absolute power over same and all channels leading thereto. It shall, while in session, have the sole and exclusive power to grant charters to affiliate bodies; to suspend or revoke for cause any charter so granted; to hear and determine all appeals and to enact laws and establish regulations to settle grievances from the membership groups or members theretof in order to carry out in the most effective manner the objectives and purposes of this Organization. The Convention does not have the power to alter or amend the Constitution except as provided in Article X hereof.

The Convention may be regular, special or constitutional and is to be so dominated in the Convention Call.

Section 2. *Place, Date and Notice*

A regular Convention is to be held at a place and date to be decided upon by the Convention in session. For the first three (3) years after ratification of this Constitution, the Convention shall be held annually. Thereafter it shall be held biennially. Special and Constitutional Convensions shall be called and held as provided in Sections 7 and 8 of this Article. Two-thirds of the registered delegates, including the elected officers of the Organization, shall constitute a quorum. The International Secretary-Treasurer shall, not less than four (4) month prior to the date of the Convention, send out to all known delegates and to all offices of the Organization the

convention call notifying them of time and place of Convention. However, in case of emergency, by a majortiy vote of the General Executive Board, the site and/or date of the Convention may be changed to a place and time more appropriate for all concerned.

Section 3. *Representation*

a) Each membership group shall be eligible to have representation in the Convention.

b) Subject to the provisions of subsection 4(a) of this Article, each membership group shall be entitled to membership representation based on the average membership in good standing for the four (4) quarters immediately preceding the Convention, but in no event shall this membership representation exceed the true mean membership of the membership group for the immediate preceding four (4) quarters.

c) Each membership group shall be entitled to a maximum number of delegates in accordance with the following table. This maximum number includes those delegates elected by virtue of their election to office:

Members	*Delegates*
up to 100	1
101 to 300	2
301 to 500	3
501 to 1000	5
1001 to 3000	7
3001 and over	25

d) Each delegate shall vote an equal percentage of the membership group he represents provided that all fractional votes be eliminated.

Section 4. *Election and Credentials of Delegates*

a) The International President, the International Executive Vice President, the International Secretary-Treasurer and the Vice Presidents shall be delegates to all Conventions, together with the most recently elected Convention delegates from each membership group.

The International President, the International Executive Vice President, the International Secretary-Treasurer and the Vice Presidents then in office by virtue of their election to such offices shall be delegates with full voice and vote.

The pro rata votes of the International President, the International Executive Vice-President and the International Secretary-Treasurer shall be calculated as follows:

i) The entire voting strength of the Convention shall be calculated as described in Section 3(b) and 3(c) above.

ii) The total number of registered delegates shall be calculated in accordance with Section 3(d) above, which number shall be increased by three.

iii) The voting strength, (from (i) above), divided by the augmented number of delegates, (from (ii) above), shall determine the pro rata vote that the International President, the International Executive Vice President and the International Secretary-Treasurer shall each cast at the Convention.

iv) The combined voting strength of the three Officers described above shall reduce, on a percentage pro rata basis, the total voting strength for each membership group.

No person shall be recognized as a delegate or alternate delegate, who is not a member in good standing. Further, each delegate and alternate delegate must be chosen by a scret postal referendum ballot in an election in which all members in good standing were eligible to participate unless that person is a delegate as provided for by this Constitution.

b) The International Secretary-Treasurer shall issue the authorized number of credentials for the delegates of each membership group which shall be properly attested to by the appropriate membership group vice president. A duplicate of said credential shall be returned to the Organization by said officer at least two (2) weeks prior to the Convention.

If an alternate presents credentials and is seated in place of the delegate-elect, he shall be the recognized representative through the remaining sessions of the Convention.

If any member of the Organization had reason to challenge the credentials of any delegate on the ground that the delegate has not been elected in accordance with this Constitution, or any other ground, the complaint is to be made to the Credentials Committee which shall investigate and report to the Convention. The Convention shall determine whether or not to seat the delegate. Failure to challenge the delegate in this manner constitutes a waiver of all objections.

c) The International Secretary-Treasurer shall pay reasonable expenses incident to the meetings of any Convention and the reasonable expenses of the International Officers and staff members, and the membership group delegates.

d) In addition to the reasonable expenses referred to in subsection(c) above, the International Secretary-Treasurer shall pay a per diem allowance to all elected "rank-an-file" delegates from the individual membership groups. This per diem shall be equal to the daily wage of an Assistant Port Agent of the Offshore Membership Group; provided however that per diem paid shall not be less than the per diem customarily paid by a former subordinate body.

Section 5. *Committees*

a) The International Subcommittee shall, at least five (5) days prior to each Convention, appoint from the delegates-elect, a committee of not less than three (3) delegates to act as a Committee on Credentials. This Committee shall have its report in writing ready for the Convention when it opens.

b) The International Subcommittee shall, at least five (5) days prior to each Regular or Special Convention, appoint the following Committees, to serve for that session only, to wit:

1) Rules
2) Constitution
3) Resolutions and Petitions
4) Laws and Legislation
5) Grievances and Appeals
6) Finance
7) General Executive Actions

It shall be the duty of the Committee on Finance to report to each Regular and Special Convention on the International Secretary-Treasurer's report, making recommendations should they deem it necessary.

Section 6. *General Conduct of Convention*

a) The order of business at a Regular or Special Convention shall be as follows:

1) Call to Order
2) Report on Credentials*

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* The Chairman of the Credentials Committee shall consult with the Chairman of the Finance Committee before making his report.

3) Report on Rules

4) Reports of International Officers

5) Report on General Executive Board Action

6) Report of Committees

7) Unfinished Business

8) New Business

9) Nomination of Officers

10) Adjournment

Except as otherwise provided by this Constitution or rules adopted by the Convention, all meetings shall be governed by Roberts Rules of Order.

b) All proposed resolutions shall be forwarded to the International Secretary-Treasurer at least thirty (30) days prior to the opening day of the Convention.

c) The order of business may be changed or suspended and new resolutions may be considered by a Convention only by a two-thirds' majority pro rata vote.

d) Members in good standing shall be authorized observers at any session of a Convention. Such members may also attend committee meetings.

Non-members specifically invited by the International President and/or by the majority pro rata vote of the Convention shall be authorized observers at any plenary session of the Convention. Such non-members may attend committee meetings only with the approval of the committee by majority vote.

Any observers who interfere with the business of the Convention or any Committee, or who violate rules established by the Rules Committee and approved by the Convention delegates shall be denied further attendance.

Section 7. *Special Conventions*

A Special Convention may be called by a two-thirds' majority vote of the General Executive Board. Special Conventions may also be called for by a petition to the International President, signed by a majority of the Board members. The time and place is to be set by the party or parties calling such Special Convention. At least thirty (30) days' written notice shall be given to the known delegates and to all offices of the Organization prior to the date of convening a Special Convention.

Section 8. *Constitutional Conventions*

a) A Constitutional Convention may be called by a two-thirds' majority vote of the General Executive Board or by a two-thirds' majority pro rata vote of a Regular Convention.

b) The time, place and written notice shall be designated by the person or body calling the Constitutional Convention.

c) Such Convention shall be limited to Constitutional matters.

d) The International Subcommittee shall, at least five (5) days prior to the Constitutional Convention, appoint a Rules Committee and a Steering and Drafting Committee unless such shall have been appointed or elected by the Convention or the General Executive Board at the time of calling the Convention.

e) The normal order of business for Conventions shall be suspended at Constitutional Conventions following the "Report on Rules" and the remainder of the Convention till adjournment shall be devoted to the report of the Steering and Drafting Committee, matters appertaining thereto and consideration and action thereon.

Section 9. *Record and Publications of Actions*

The credentials of delegates, resolutions introduced and other records of each Convention shall be preserved until the next Regular Convention. Minutes of each Convention, and other documents or records required by law, shall be permanently maintained by the International Secretary-Treasurer.

Within ninety (90) days of the conclusion of a Convention, the affirmative actions shall be prepared and distributed to all members, noting the action taken by the Convention.

Section 10. *Verbatim Record*

A verbatim record shall be kept at all Conventions and copies shall be forwarded to all delegates and all ports in which the Organization maintains an office, as soon as possible after the close of a Convention.

Section 11. *Proxy Votes*

There shall be no proxy votes at any Convention.

Article V

INTERNATIONAL OFFICERS GENERAL EXECUTIVE BOARD AND REPRESENTATIVES

ELECTION PROCEDURES

Section 1. *Notice of Elections*

Not less than fifteen (15) days prior to any election, the International Secretary-Treasurer shall give appropriate notice to the membership of the forthcoming election.

Section 2. *International Officers and Membership of General Executive Board*

The Officers of this Organization shall consist of an International President, an International Executive Vice

President, and International Secretary-Treasurer and Vice President as follows:

(1) Vice President—Atlantic Ports

(2) Vice President—Gulf Ports

(3) Vice President—Pacific Ports

(4) Vice President—Pilotage

(5) Vice President—Atlantic and Gulf Marine Region

(6) Vice President—Pacific Maritime Region

These officers and additional Vice President, if any, as hereafter provided, shall collectively constitute the General Executive Board of the Organization.

Additional Vice Presidents may be elected for any membership group provided in Article III, Section 1(h) which is not currently and specifically represented on the General Executive Board at the general election following the date when membership of such group reaches at least 500 members, or for any affiliated body in accordance with the Affiliation Agreement.

Section 3. *Election of Officers and Terms of Office*

a) The International President, the International Executive Vice President, and the International Secretary-Treasurer shall be elected by a plurality vote of the general membership of the Organization, provided the winning candidate receives at least forty percent (40%) of the valid ballots counted. All other elections provided for in this Constitution shall be by plurality vote.

If a run-off election is necessary it shall be between the two candidates receiving the highest vote. If one of the two candidates in a run-off election declines to run, the other candidate shall be deemed elected for said International Office. The International Ballot Committee, the Impartial Balloting Agency, and the balloting procedures

shall be the same as in the original election. The original list of eligible voters, with deletion of members who are no longer in good standing shall be used for the mailing of ballots. No other proposition may be placed on the ballot and the balloting shall commence forthwith but in no event later than thirty (30) days following the certification of the results of the election.

b) The Vice President—Atlantic Ports, Vice President —Gulf Ports and Vice President—Pacific Ports shall be elected by the members of the Organization classified as "Offshore Membership".

c) The Vice President—Pilotage shall be elected by the members of the Organization classified as "Pilot Membership".

d) The Vice President—Atlantic and Gulf Maritime Region (formerly Regional Director) shall be elected by the membership of the Atlantic and Gulf Maritime Region.

e) The Vice President—Pacific Martime Region (formerly Regional Director) shall be elected by the membership of the Pacific Maritime Region.

f) Voting shall be by secret ballot and conducted by an impartial balloting agency selected by a majority pro rata vote of the International Convention, except that for the 1977 elections for the Officers in (d) and (e) above, the election procedures previously used by these groups shall govern.

g) Unless legally removed, and conditioned upon their being and remaining in good standing in the Organization, all elected International Officers shall hold their respective offices for a term of three (3) years, or until their successors are duly elected and installed.

Section 4. *Eligibility for Nomination and Election as an International Officer*

Any member meeting the requirements of this section shall be eligible for nomination to and election as an

International Officer of the Organization as listed in Article V, Section 2.

a) To insure that the leadership of the Organization continues to be drawn from the ranks of its supervisory and professional membership with broad and current experience in the maritime industry, the following qualifications shall be necessary for nomination and election. The member shall:

(1) Have been a member of the Organization for a period of at least four (4) years and is and has been continuously in good standing for the twenty-four (24) months preceding nomination.

(2) Additionally, the International President, International Executive Vice President, and International Secretary-Treasurer must meet the requirements as hereafter listed for election as Vice President for one of the membership groups of the Organization.

b) The Vice President—Atlantic Ports, Vice President —Gulf Ports and Vice President—Pacific Ports in addition to the requirements of Section 4(a)(1) above must:

(1) have had his membership classified as Offshore Membership for the twenty-four (24) months preceding nomination.

(2) for all elections subsequent to January 1, 1980, within such twenty-four (24) month period of (b)(1) immediately above

(i) have served 180 days under the authority of his license aboard vessels for which the Organization is the recognized bargaining agent; or

(ii) have served the Organization during such twenty-four (24) month period for 180 days of actual service as an officer or as a paid or unpaid official, representative, delegate or committeeman; or

(iii) any combination of the above.

c) The Vice President—Pilotage, in addition to the requirements of Section 4(a)(1) and (2) above must:

(1) have had his membership classified as Pilot membership for the twenty-four (24) months preceding nomination,

(2) for all elections subsequent to January 1, 1980, within the twenty-four (24) month period of (c)(1) immediately above

(i) have served 180 days in the capacity of a "Pilot" as described in the Pilot Membership Group of Article III, Section 4(h)(2) of this Constitution; or

(ii) have served the Organization during such twenty-four (24) month period for 180 days of actual service as an officer or as a paid or unpaid official, representative, delegate or committeeman; or

(iii) any combination of the above.

d) The Vice President—Atlantic and Gulf Maritime Region and the Vice President—Pacific Martitime Region, in addition to the requirements of Section 4(a)(1) and (2) above, must possess a valid license as an officer of vessels of the United States and

(1) have been a member of his respective membership group for the twenty-four (24) months preceding nomination,

(2) for all elections subsequent to January 1, 1980, within such twenty-four (24) month period of (d), (1) immediately above

(i) have served 180 days under the authority of his license aboard vessels for which the Organization is the recognized bargaining agent; or

(ii) have served the Organization during such twenty-four (24) month period for 180 days of actual service as an officer or as a paid or unpaid official, representative, delegate or committeeman; or

(iii) any combination of the above;

e) At the time of initial election of any Vice President for the membership groups not specifically represented on the General Executive Board as of the date of adoption of this Constitution, any member whose membership is in such group shall be eligible for nomination to and election as such Vice President, provided that at the time of nomination he has been a member of the Organization for a period of two or more years with membership in the applicable membership group for one year immediately preceding nomination and is and has been in continuous good standing for the 12 months preceding nomination. For all elections subsequent to the initial election the periods of membership and good standing for eligibility and election shall conform to the requirements of Section 4(a)(1) and (2) above and there shall be such additional requirements as the General Executive Board shall provide.

f) The continuous good standing requirements of paragraphs 4(a) through (e) inclusive above, shall not be applicable to nominations and elections before January 1, 1980.

g) No candidate for an elective, paid position for a membership group shall accept nomination to or be a candidate for Vice President of such membership group or for International President, International Executive Vice President or International Secretary-Treasurer. No member can accept nomination to or be a candidate for more than one office described in Article V, Section 2.

Section 5. *Nominations for International Officers*

Nominations for the offices of International President, International Executive Vice President, International Secretary-Treasurer and all Vice Presidents shall be made at the Regular Convention preceding the election, subject to the provisions of Section 3(f) of this article.

When a nomination is made in Convention for these offices, the mover of the nomination must at such time present a statement setting forth the nominee's name, last known address, qualifications, background and general experience. The same information required of a member nominated in Convention shall be furnished along with any nomination by petition.

Nominations may also be made by petition signed by not less than fifty (50) members of the Organization, provided that with respect to nominations for Vice President, the petition must be signed by five (5) members of the applicable membership group. Verification of the good standing of the petitioners shall be made under the supervision of the International Secretary-Treasurer. All such nominations by petition must be received by the International Secretary-Treasurer prior to the time the Chairman declares nominations closed for International Officers.

No later than ten (10) days after the close of nominations, each candidate shall have the right to submit a statement of fact not to exceed two hundred (200) words which shall include such information as:

a) Date of joining Organization;

b) Subordinate bodies he has belonged to and membership Group, if any;

c) License, date and issue number, if any.

This statement by a candidate shall appear on the ballot. If a statement is not furnished as required in this section, no statement shall appear with the candidate's name on the ballot.

Notification to Nominees

The nominees for the office of International President, International Executive Vice President and International Secretary-Treasurer and Vice Presidents shall be notified by the International Secretary-Treasurer by telegram or

cable of their nomination.* Such telegram or cable shall advise the candidates of the following:

a) the ten-day acceptance rule.

b) that his written acceptance must state that he is not disqualified as a candidate by the Labor-Management Reporting and Disclosure Act of 1959.

c) of his right to submit a statement of fact for inclusion on the ballot, not to exceed 200 words which shall include such information as required in a), b), and c) of this Section 5.

Acceptance of Nomination

Only those candidates who shall have notified the International Secretary-Treasurer, in writing, within ten (10) days after the close of the nominating period that they will accept the nomination shall have their names placed on the International ballot.

Every candidate for any office in the Organization shall certify in writing that he is not prevented from holding office by any provision of the Labor-Management Reporting and Disclosure Act of 1959 or by any provision of the International Constitution. Such certification shall accompany every candidate's acceptance of his nomination for office.

Section 6. *Representatives*

To enable the Organization to be responsive to and meet its changing needs and that of its active and retired membership it shall open, close and operate offices or other facilities at various Ports, Regions or otherwise to meet specialized membership needs. Such offices or other facilities shall be staffed by representativs who may be called

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* (For the purposes of this Section, telegrams or cables shall be considered communications in writing.)

Port Agents, Assistant Port Agents, Pilot Regional Representatvies, Branch Agents, and such other titles as set forth in the work rules of the membership groups, or such other title as may be established by the General Executive Board, together with such clerical and other assistants as may be authorized from time to time. The Offices and facilities of Ports shall be operated on the basis of requirements of service to the active and retired membership. The ports listed in subparagraph (a) (1) below shall remain open for service to that membership for a minimum period of three years following the adoption of this Constitution. Effective January 1, 1978, the Vice President—Atlantic Ports, Vice President—Gulf Ports and Vice President—Pacific Ports, by virtue of their election to such office, during their incumbency and in addition to their other duties and responsibilities as provided by this Constitution, shall serve without additional compensation as the Port Agents for New York, New Orleans and San Francisco, respectively. In addition, and to assist the International Officers in carrying out their functions, other Port Agents, Assistant Port Agents and Pilot Regional Representatives and other Representatives shall be nominated and elected as set forth herein:

a) *Port Representatives*

(1) Effective January 1, 1978, the following Ports shall have the Port Agents and Assistant Port Agents as shown for each:

New England	1 Assistant Port Agent
New York	1 Vice-President/Port Agent
	4 Assistant Port Agents
Philadelphia	1 Assistant Port Agent
Baltimore	1 Port Agent
Norfolk	1 Port Agent
	1 Assistant Port Agent
Charleston, S.C.	1 Assistant Port Agent

Jacksonville	1 Port Agent
Mobile	1 Port Agent
New Orleans	1 Vice President/Port Agent
	2 Assistant Port Agents
Houston	1 Port Agent
	1 Assistant Port Agent
Galveston	1 Port Agent
Los Angeles/ Long Beach	1 Port Agent
	1 Assistant Port Agent
San Francisco	1 Vice President/Port Agent
	3 Assistant Port Agents
Portland	1 Assistant Port Agent
Seattle	1 Port Agent

(2) Any member meeting the qualifications for election as Vice President—Atlantic Ports, Vice President—Gulf Ports, and Vice President—Pacific Ports, shall be eligible for nomination and election as a Port Agent or Assistant Port Agent in the same manner and at the same time as International Officers are nominated and elected except that only three signatures shall be required for a nominating petition. Unless legally removed, each such Port Agent or Assistant Port Agent shall serve for a period of three years or until his successor is duly elected and installed.

b) *Pilots Regional Representatives*

1) There shall be Pilot Regional Representatives for the Atlantic Coast, Gulf Coast and Pacific Coast, respectively. Further, such other geographic regions as established by the General Executive Board which may subsequently reach a membership of 100 or more shall be entitled to a Regional Representative. Such Regional Represensative shall be appointed by the General Excutive Board from, and on the recommendation of, the newly

established region membership, to serve until the next regular election.

2) Any member meeting the qualifications as Vice President—Pilotage shall be eligible for nomination and election as Pilot Regional Representative in the same manner and at the same time as International Officers are nominated and elected, except that only three signatures shall be required for a nominating petition. Unless legally removed, each such Pilot Regional Representative shall serve for a period of three years or until his successor is duly elected and installed.

c) *Atlantic and Gulf Maritime Region*

(1) The elected positions for the Atlantic and Gulf Maritime Region (the former Atlantic and Gulf Region of the Inland Division), in addition to the Vice President, as set forth in Article V Section 2, shall be those as set forth in its work rules as of the date of the adoption of this Constitution, except that the titles and functions of such elected representatives shall not apply or be implemented in a manner in conflict with the new restructuring of the Organization contained in this Constitution.

(2) The qualifications for such elected positions and the elective procedures set forth in the work rules shall govern the election of such officers for the 1977 election. The elective procedures thereafter shall be the same as for all other membership groups and qualifications shall be the same as provided in Section 4(d) above.

d) *Pacific Maritime Region*

(1) The elected positions for the Pacific Maritime Region, in addition to the Vice President, as set forth in Article V Section 2, shall be those as set forth in the work rules of the Pacific Maritime Region as of the date of the adoption of this Constitution, (the former West Coast and Pacific Region of the Inland Division),

except that the titles and functions of such elected representatives shall not apply or be implemented in a manner in conflict with the new restructuring of the Organization contained in this Constitution.

(2) The qualifications for such elected positions and the elective procedures set forth in the work rules shall govern the election of such officers for the 1977. The elective procedures thereafter shall be the same as for all other membership groups and qualifications shall be the same as provided in Section 4(d) above.

e) *Other Regional Representatives*

Regional Representatives for other membership groups may be established in such numbers and for such areas as the General Executive Board shall determine initially. They may be elected at the next regular election following such time as the total membership in any such membership Group reaches 500 or more. Further elections to such positions after the first one shall be established by amendment to this Constitution. Eligibility requirements and nomination and election procedures for such additional membership Group representatives shall be similar to those set forth in this section or as specified by the General Executive Board.

(f) *Field Representatives*

In addition to the Representatives listed above, the General Executive Board may from time to time, appoint such Field Representatives as it deems necessary to serve as Organization Representatives for such areas on such conditions and for such remuneration as it shall determine.

g) *Vacancies*

In the event of any vacancy in the position of any elected or appointed Representative through death, resignation or otherwise, the General Executive Board may

for the period extending to the next election fill that vacancy by appointing a new Representative, request that another Representative fill the vacancy, transfer the functions of the vacant position to another Representative, or if it so chooses leave the vacancy unfilled.

Section 7. *Election of International Ballot Committee*

An International Ballot Committee shall supervise the election and certify that the election was conducted in accordance with the International Constitution.

The Committee shall consist of five (5) members and a first, second, third, fourth and fifth Alternate, nominated and elected by the Convention who are not candidates for office in the election to be supervised.

The Committee shall elect its own Chairman.

Section 8. *List of Eligible Voters*

a) Prior to the close of the nominating period, the International Secretary-Treasurer shall cause to be prepared in duplicate a listing of the active members of each membership group who have not been suspended for non-payment of dues, which listing shall include the social security number and last known address of each such member as recorded on the Organization records, shall be dated and certified to by the International Secretary-Treasurer who shall furnish a copy of such listings to the Impartial Balloting Agency.

b) Each member whose name appears on the above list shall be mailed a ballot.

c) If for any reason any active member does not receive his ballot he may request, in writing, a ballot from the Impartial Balloting Agency. Such request shall include a statement that he has neither received nor voted any ballot in this election. The Impartial Balloting Agency shall issue a ballot to such member found entitled

thereto. If a duplicate ballot is issued it will be clearly marked "DUPLICATE."

Section 9. *Balloting Procedure*

a) (1) The Impartial Balloting Agency shall send out sufficient sample official ballots for the membership groups of the Organization and each such ballot shall bear the names of only the candidates who have been nominated and who shall have notified the International Secretary-Treasurer of their acceptance of such nomination that the respective membership group is entitled to vote upon. The form of the official ballot shall be stamped across the body of the ballot "SAMPLE." Sample ballots shall not be defaced.

(2) The ballots for each membership group shall contain only the names of the candidates in elections in which the members of such group may vote as provided in Section 3 of this Article.

b) The ballot shall be enclosed in an envelope which shall have only the following printed thereon: SECRET BALLOT.

The SECRET BALLOT envelope shall be enclosed in an outer envelope which shall have the following information completed by the member in the upper left hand corner: his printed name and address, his membership group, social security number, and his signature. This envelope shall be prestamped and self-addressed to the Depository designated by the Impartial Balloting Agency to be kept for tabulation and certification purposes.

c) The Impartial Balloting Agency shall be responsible for making all arrangements for such Depository and for the placing therein of the locked and sealed ballot box of the Organization. All such arrangements shall be subject to the approval of the International Ballot Committee. The Impartial Balloting Agency shall retain in its possession the keys to the locked and sealed ballot box

until the election results have been certified by the Impartial Balloting Agency.

d) Immediately following the tenth day after the close of the nominating period, the Impartial Balloting Agency under the supervision of the International Ballot Committee shall prepare the official ballot and shall mail one such ballot to each member of the Organization who has not been suspended for non-payment of dues at the time the ballots are mailed out. All ballots shall be mailed not later than the thirtieth day following the close of the nominating period at which nominations have been made.

e) In any case where a member has listed an office of the Organization or care of an official of the Organization as his last known address, the Impartial Balloting Agency shall mail a notice to such member at that address informing such member of the means by which he can obtain his ballot. The Impartial Balloting Agency shall not send any ballot to an office of the Organization nor in care of an official thereof except the official's own ballot to his own home.

f) The International Ballot shall be officially closed ninety (90) days after the date of mailing of the ballots by the Impartial Balloting Agency. All ballots received later than that date shall be declared void. In the case of those members receiving duplicate ballots, the ballot counted shall be the ballot bearing the earliest date stamp of the Impartial Balloting Agency.

g) The members of the official International Ballot Committee and the Impartial Balloting Agency shall be empowered with an order executed by the Organization and signed by the International President and International Secretary-Treasurer and under the seal of the Organization to proceed within seven (7) days following the close of the balloting to the Depository where the locked and sealed ballot box is kept. Upon presenting the duly executed order to the custodian of the Depository

said custodian shall deliver the ballot box which shall contain all ballots which have been cast.

h) The Impartial Balloting Agency shall proceed then to counting the ballots. Candidates receiving a plurality vote of the general membership for each office, except as provided in Section 3 (a) above, shall be declared elected and a certification of the results shall be made by the Impartial Balloting Agency. Telegrams or other communications shall be sent to all ports of the Organization containing the results of said elections.

i) Challenges to the election may be made to the International Ballot Committee at the time of the counting of the ballot by the candidate or his representative observer who shall possess certification of same from the candidate he represents. Appeals from rulings of the Ballot Committee shall be taken to the General Executive Board and then to the Convention. Challenges to the election may also be made to the General Executive Board, in writing, within thirty (30) days from the date of completion of the counting of the ballot. An appeal from the ruling of the General Executive Board may be taken to the Convention.

j) The ballots and all records pertaining to the election must be preserved for one year.

Section 10. *Miscellaneous Election Matters*

a) Any candidate desiring to distribute literature in connection with his candidacy, as provided under Section 401 (c) of the Labor-Management Reporting and Disclosure Act of 1959, shall be required to pay in advance for the cost of such distribution. The amount shall be certified by the independent mailing service as designated by the Impartial Balloting Agency. The Impartial Balloting Agency shall make appropriate arrangements for the security of the mailing list. The Impartial Balloting Agency shall immediately notify the candidates of the

name of the mailing service and the cost of distribution of the candidate's literature.

b) Installation of officers shall take place not later than thirty (30) days after the certified results of the ballot are known, at the convenience of the successful candidate.

* * * *

Article X

AMENDMENT OF CONSTITUTION

Section 3. *State and Federal Law; Separability Clause*

Any provision within this Constitution that is in direct conflict with any State or Federal Law shall not be enforced by the elected Officers of the Organization. The General Executive Board shall have authority between Conventions to amend this Constitution as necessary to remove any conflict between its provisions and those of any applicable Federal or State Law.

If any provision of this Constitution, or the application of such provision to any person or circumstance, shall be held invalid, and remainder of this Constitution, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

BROWN AFFIDAVIT, EXHIBIT B

09 May 1988
Tampa, Florida

Captain Francis E. Kyser
Secretary-Treasurer
IOMMP
700 Maritime Blvd,
Linticum Hts., MD. 21090

Dear Captain Kyser:

I will be a candidate for International office in the IOMMP when election are held in the fall.

In order to avoid the usual diatribes and hub-bubs about election literature and when it can be sent out, I will be sending out election literature prior to the Convention and want the International office to provide me with access to the mailing list through an independent mailing service as has been provided in the past. I will make the necessary arrangements to have the literature delivered in a timely manner as soon as you provide me with the name of the service and a phone number where I can escertain the cost associated with the mailing.

Fraternally yours,

/s/ TAB
TIMOTHY A. BROWN
Offshore Membership Group
266-66-7905
4615 Navajo Ave.
Tampa, Fla. 33617

BROWN AFFIDAVIT, EXHIBIT C

02 June 1988
Tampa, Florida

Captain Robert J. Lowen
International President
IOMMP
700 Maritime Blvd.
Linticum Hts., MD. 21090

Dear Bob:

As you know, you and I are going to be opposing candidates for the Presidency of the IOMMP this fall. Given what I assume is our mutual belief that both the maritime industry and the IOMMP are approaching the endangered species list, I think it is critical that you and I work together to avoid the quadrennial madness that has weakened us internally and has weakened the way that we present ourselves to other maritime unions, to the shipping companies, to Congress, to Marad, and to the public.

A starting point is for you and I to agree on fair and early procedures for getting our different messages to the membership. The mailing list should be delivered to the mailing service within 2 weeks and the list should be divisible to allow targeted mailings dealing with particular concerns of various groups of members be they pensioners, inland members, ARA members, etc.

I intend to send my first mailing to the membership by the 6th of July. I want to make you aware of that so that you can be in a position to present your views about the same time that I am presenting mine. I think that all candidates should be invited to begin presenting their positions as early as possible and I think that the union serves its own best interests when it makes it as easy as possible for candidates to do so.

In addition, you and I should try to agree on a mutually acceptable ballot committee which will minimize distrust on all sides.

It is my intention to run a strong, vigorous, and positive campaign. Your approach and my approach to many issues are quite different and I think the members of our union are entitled to know those differences and I intend to hold your feet to the fire on all issues that are relevant to the future of our members, of our union, and of the maritime industry. But I do not think we can afford the luxury of this campaign of raising doubts about the democratic process or of engaging in character assassinations. I urge you to work with me in assuring a full, fair, and vigorous debate and an election for a change, which everyone can have confidence was conducted with the highest degree of integrity.

I have already informed Elwood with regards to my candidacy almost a month ago and have not had the courtesy of a reply. I will be calling you within the next two weeks to discuss the specifics.

Fraternally yours,

/s/ TAB
TIMOTHY A. BROWN
Offshore Membership Group
266-66-7905
4615 Navajo Ave.
Tampa, Fla. 33617

BROWN AFFIDAVIT, EXHIBIT D

[SEAL]

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES & PILOTS

700 Maritime Blvd., Linthicum Heights, MD. 21090-9998
Tel. No.: (301) 850-8700
Cable: BRIDGEDECK WASHINGTON, D.C.
Telex No. 750-831/Telecopier No.: (301) 850-8725

ROBERT J. LOWEN
International President

F. ELWOOD KYSER
International Secretary-Treasurer

June 7, 1988

Captain Timothy A. Brown
4615 Navajo Avenue
Tampa, FL 33617

Dear Brother Brown:

I recently had the opportunity to see a copy of the letter you wrote to Captain Lowen dated June 2, 1988 and the attachment, which was a letter written to my office dated May 9, 1988.

I must apologize for the delay in responding to your initial letter, but I would like to take this opportunity to address your request.

Although I can understand your eagerness in wanting to send out your campaign literature early, please be advised that as soon as the rules are established for mailing campaign literature, all candidates will be notified at the same time.

As the practice has been in the past, and the Constitution prescribes, the IOMM&P Convention is the event in which all candidates officially are nominated to run for a particular office. Only after the Convention takes place,

and when the Impartial Balloting Agency is designated, will the mailing agency to handle campaign literature be designated. Please refer to Article V, Section 10 of the International Constitution. This procedure has been established so that each candidate will have a fair and equal amount of time in which to adequately reach the membership and to prohibit any one candidate from having an edge over the other.

In the meantime, I wish you good luck in your campaign, and look forward to seeing you at the 72nd Convention.

Fraternally,

/s/ F. Elwood Kyser
F. ELWOOD KYSER
International Secretary-Treasurer
and Offshore Contracts Officer

FEK: kae

BROWN AFFIDAVIT, EXHIBIT E

15 June 1988
Tampa, Florida

General Executive Board
I.O.M.M.P.
700 Maritime Blvd.
Linticum Hts., MD. 21090

Dear Sir:

I have recently been denied access to the mailing service selected by the IOMMP International Ballot Committee through the attached letter from Captain Kyser.

I demand this right as a candidate for union office in the upcoming Master Mate and Pilot Fall Election and reiterate my desire to have this matter taken care of by July 5th.

In addition, I demand that the mailing service selected be provided with "Cheshire labels" to facilitate this mailing.

Fraternally yours,

/s/ Timothy A. Brown
TIMOTHY A. BROWN
Offshore Membership Group
266-66-7905
4615 Navajo Ave.
Tampa, Fla. 33617

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civ. No. ——

TIMOTHY A. BROWN,
Plaintiff,

v.

ROBERT J. LOWEN, F. ELWOOD KYSER, and INTERNATIONAL ORGANIZATION OF MASTERS, MATES, AND PILOTS,
Defendants.

AFFIDAVIT OF PAUL ALAN LEVY

1. My name is Paul Alan Levy. This affidavit is made in support of plaintiff Timothy Brown's motion for a preliminary injunction in this case.

2. On June 27, 1988, I spoke to counsel for the defendants, Burton Epstein, Esquire, and advised him that I was representing plaintiff and that I intended to file suit promptly, but that I hoped that the union would resolve the matter internally without the need for judicial intervention. Mr. Epstein stated that Brown's request for the right to do a mailing had been placed on the agenda of a General Executive Board ("GEB") meeting scheduled for July 6, 1988, and I said that in that event I would forebear from filing suit until after that date. I confirmed our conversation by a letter of the same date, a copy of which is attached as Exhibit F (the letters of the exhibits to my affidavit are sequential to the Exhibits to plaintiff Brown's affidavit). I also supplied various legal citations to opposing counsel in an effort to persuade him to recommend to his client that it accede to Brown's request.

3. On July 6, 1988, I telephoned Mr. Epstein to learn whether the GEB had granted Brown's request. During the evening of July 6, 1988, defendant's Vice-President John Hayes, whom I represent in another matter, told me that the request had been denied. On July 7, 1988, I received a telephone message from Mr. Epstein confirming Mr. Hayes' statement.

4. An affidavit submitted by Mr. Hayes in *Hayes v. Masters, Mates & Pilots*, No. HM 87-1084 (D. Md.), states on his personal knowledge that the union has the ability to produce computerized mailing labels in a form that can be affixed to mailings by machine. A copy of the relevant pages from that affidavit is attached as Exhibit G.

5. I attach as Exhibit H a copy of a decision rendered by the United States District Court for the Northern District of Georgia in *Mims v. Teamsters Local 728*, No. C 86-454 A, which is cited in plaintiff's memorandum of law.

6. I have received from Mr. Brown an exchange of correspondence between himself and Richard Hunsucker. Mr. Hunsucker is personally known to me as the principal career Labor Department official charged with the enforcement of the union election provisions of the Landrum-Griffin Act, and I recognize both his signature and his letterhead which appear to be genuine. I attach copies of this exchange of correspondence as Exhibit I.

7. On July 11, 1988 I spoke with Mr. Epstein and told him that suit would be filed on that date, along with a motion for a preliminary injunction. I asked him whether he would accept service for the union. Mr. Epstein told me that he was not authorized to accept service, but that service would be accepted by the appropriate individuals at the union office. He indicated that I should not expect problems serving the union.

7. After I learned from Louise McKnew that the union had refused to accept service, as recounted in her affi-

davit, I received a call an individual who identified himself as Jim Nolan. Mr. Nolan said that he was a lawyer who was handling plaintiff's request for emergency relief, and asked whether a hearing had been scheduled. I responded that there was not, told him about the problems that Ms. McKnew had encountered at the union office, and asked him whether his client was going to continue to refuse service. Mr. Nolan told me that he was not authorized to take service, and that it was plaintiff's responsibility to serve the defendants. Mr. Nolan acknowledged having received some papers relating to the motion for a preliminary injunction, but emphasized that he was not agreeing that the union had been served.

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that the foregoing is true and correct. Executed on July 19, 1988.

/s/ Paul Alan Levy
PAUL ALAN LEVY

Excerpts from BROWN *v.* LOWEN

LEVY AFFIDAVIT, EXHIBIT F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. HM 87-1084

JOHN N. HAYES, and JAMES E. LARSEN,
Plaintiffs,

v.

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES & PILOTS,
Defendant.

AFFIDAVIT OF JOHN N. HAYES

This affidavit is submitted in support of plaintiffs' request for relief in the above action.

* * * *

24. Because I believe most members mark and return their ballots shortly after receiving them, it appeared to me that the union leadership was trying to make it impossible for me to communicate my own views to the membership before most of them would cast their ballots. In fact, the union has the capacity to generate labels which could be mechanically affixed to a mailing by a professional mailing service in a matter of hours. By printing the members' names and addresses on gummed labels, the union guaranteed that the job of affixing them on a mailing would have to be done manually and at greater cost to anyone wishing to oppose the leadership's referendum. And by designating the union's own printer as the one firm that a member would have to use to perform this

service, the union was probably able to assure that any opposition mailings could be delayed.

* * * *

Pursuant to 28 U.S.C. § 1746, I hereby affirm under penalty of perjury that the foregoing representations in 51 numbered paragraphs are truthful and correct.

Dated: May 15, 1987.

/s/ John N. Hayes
JOHN N. HAYES

LEVY AFFIDAVIT, EXHIBIT I

U.S. DEPARTMENT OF LABOR [SEAL]

Office of Labor-Management Standards
Washington, D.C. 20210
Reply to the Attention of:

LUE: JBF

[JULY 15, 1988]

Mr. Timothy A. Brown
4615 Navajo Avenue
Tampa, FL 33617

Dear Mr. Brown:

This is in response to your July 1 letter concerning the right of a candidate in a labor organization officer election to send out campaign literature through the facilities or services of the union.

Elections of officers of labor organizations subject to the provisions of the Labor-Management Reporting and Disclosure Act of 1959, As Amended (LMRDA), must meet certain criteria, as set forth in Title IV of the Act. The International Organization of Masters, Mates and Pilots is a union which is subject to the LMRDA.

The Assistant Secretary for Labor-Management Standards has published and publicized a series of regulations which explain the Department of Labor's positions concerning various aspects of union officer elections. Among these regulations are several which relate directly to the problem about which you wrote.

In Title 29, Code of Federal Regulations, Part 452.67 (29 CFR 452.67), the Assistant Secretary explains that unions and their officers have a duty to comply with all

reasonable requests of any candidate to distribute his campaign literature to the membership at his own expense. It is not necessary that a member must first have been officially nominated before this duty accrues. As stated in 29 CFR 452.80, "a union may reasonably require that a person be nominated in order to be elected, but may not prevent a member who actively seeks office and is otherwise qualified from taking advantage of the campaign safeguards to the Act in an effort to gain the support necessary to be nominated."

Additionally, 29 CFR 452.79 provides that there must be a reasonable period prior to the election during which candidates and their supporters may campaign. The length of that reasonable period is dependent on a number of factors including the method of nomination, the size of the union, and the geographic area in which it operates. Maritime unions generally require more time for this purpose than do land-based organizations of limited geographic jurisdiction.

The Department of Labor's position, regardless of the composition and nature of the union, is that a candidate becomes a candidate when he professes to be one and, as such, is entitled to mail his campaign literature to the members through the union's facilities but, at his own expense. Of course, it would ordinarily be unreasonable to presume that refusal to honor a mailing request which was made long before the election would be a violation of Title IV which could affect the election's outcome. Nevertheless, the fact that candidates have not been officially nominated, that an election committee or outside balloting agency has not yet been chosen or that a mailing agency has not yet been selected is not determinative. A self-professed candidate is entitled to make campaign literature mailings at his own expense and may ask to have them sent within a reasonable period of time prior to the election. A request for a mailing to be made approxi-

mately one month prior to nominations would appear to be reasonable.

Sincerely,

/s/ Richard G. Hunsucker
RICHARD G. HUNSUCKER
Director, Office of Elections, Trusteeships
and International Union Audits

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civ. No. HAR 88-1194

TIMOTHY A. BROWN,
Plaintiff,

v.

ROBERT J. LOWEN, F. ELWOOD KYSER, and
INTERNATIONAL ORGANIZATION OF MASTERS,
MATES, AND PILOTS,
Defendants.

AFFIDAVIT OF LOUISE McKNEW

1. My name is Louise McKnew. I am the administrator of Public Citizen.

2. On July 15, 1988, at approximately 4 p.m., I went to the office of the International Organization of Masters, Mates and Pilots ("IOMMP") to attempt to deliver summonses, complaints and preliminary injunction papers for the IOMMP, Robert Lowen and Elwood Kyser to those defendants, their attorneys, or anyone else authorized to accept the documents on their behalf.

3. I initially asked for Mr. Lowen, and was advised by a receptionist that he was not in his office. I then asked to see his secretary. Shortly thereafter a large, heavy-set woman came down the hall, stopping about twenty feet from me. She did not introduce herself. I introduced myself, announced my purpose, and asked if she would accept the documents I had in my hands for Mr. Lowen. She backed away from me as I walked toward her, said she would not accept anything, and rudely refused to give me her name.

4. I then asked the receptionist if she would direct me to the office of the general counsel, specifically Mr. Epstein's office. She told me that he was unavailable. I asked if I could see his secretary or his assistant and was told that they too were "out."

5. Next I asked the receptionist if she would accept the delivery on behalf of either Mr. Lowen or his attorney, and she too refused to either accept the documents or to give me her name.

6. Finally, I asked the clerk at the front desk, if she would accept the documents on behalf of Mr. Lowen, and she told me that she was authorized to accept nothing, not even Federal Express deliveries. She identified herself as Donna Blackburn.

7. I then left with the documents

> Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that the foregoing is true and correct. Executed on July 19, 1988.
>
> /s/ Louise McKnew
> LOUISE MCKNEW

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HAR-88-1994

TIMOTHY A. BROWN,
Plaintiffs,

v.

ROBERT J. LOWEN, *et al.*,
Defendants.

AFFIDAVIT OF HARRY SEIDMAN

I, Harry Seidman, do hereby solemnly declare and affirm under the penalties of perjury that the following facts are true and correct.

1. I am over the age of 18 years and I am competent to be a witness. I have personal knowledge of the facts set forth in this affidavit.

2. I am Comptroller of the International Organization of Masters, Mates & Pilots and have occupied that position since September 1, 1970. As Comptroller, I assist the International Ballot Commitee in the performance of its duties.

3. In 1980, the convention was held from July 2 to July 26, 1980. The ballots were mailed to the membership on August 25, 1980.

4. In 1984, the convention was held from July 24 to July 27, 1984. The ballots were mailed to the membership on August 27, 1984.

5. The approximate cost to the organization of the 1980 election was $122,500.00. The approximate cost to the organization of the 1984 election was $129,000.00.

Dated: July 15, 1988

/s/ Harry Seidman
HARRY SEIDMAN

State of Maryland
County of Anne Arundel

Signed and sealed before me this 15 day of July, 1988.

/s/ Beverly J. Gutmann
BEVERLY J. GUTMANN
Notary Public

My commission expires July 1, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HAR88-1994

TIMOTHY A. BROWN,
Plaintiff,

v.

ROBERT J. LOWEN, *et al.*,
Defendants.

AFFIDAVIT OF ROBERT J. LOWEN

I, Robert J. Lowen, do hereby solemnly declare and affirm under the penalties of perjury that the following facts are true and correct.

1. I am over the age of 18 years and I am competent to be a witness. I have personal knowledge of the facts set forth in this affidavit.

2. I am International President of the International Organization of Masters, Mates & Pilots. I am familiar with the election procedures of the organization. Exhibit A to this affidavit is a copy of the IOMM&P Constitution.

3. Article V of the IOMM&P Constitution governs election procedures. It provides that nominations for the offices of the Organization, which include International President, International Secretary/Treasurer and eight vice presidents, are made at the regular convention preceding the election. As Article V, section 5 provides, nominations may be made in convention or may be made by petition. A member may move his own nomination. Following nomination, nominees are notified of their nomination and advised that they must accept nomina-

tion within ten days. The convention is scheduled to commence on August 22, 1988 and to last until August 24, 1988.

4. The election itself is conducted by an Impartial Balloting Agency under the supervision of the International Ballot Committee. The Ballot Committee is elected at the convention. Article 5, section 7. The Impartial Balloting Agency is also selected at the convention. Article 5, section 3f.

5. The procedure for distribution of campaign literature is set forth in Article V, section 10a of the Constitution. It is as follows:

> Any candidate desiring to distribute literature in connection with his candidacy, as provided under section 401(c) of the Labor Management Reporting and Disclosure Act of 1959, shall be required to pay in advance for the cost of such distribution. The amount shall be certified by the independent mailing service as designated by the Impartial Balloting Agency. The Impartial Balloting Agency shall make appropriate arrangements for the security of the mailing list. The Impartial Balloting Agency shall immediately notify the candidates of the name of the mailing service and the cost of distribution of the candidates literature.

6. The procedure followed under the IOMM&P Constitution for distribution of campaign literature does not permit access to the mailing list for distribution until after nominations have been made. No candidate, including incumbents, may use the mailing list for this purpose before this time. The International Ballot Committee meets after the close of the convention and reviews the qualifications of candidates to ensure their eligibility. Candidates are required to accept nomination within ten days and to certify that they are not prevented from holding office (Article V, section 5). Once

all candidates are certified, the Impartial Balloting Agency notifies all candidates at the same time of the conditions for distribution of literature. The mailing agency is selected by the Impartial Balloting Agency and is not the same mailing agency used for other communications to members.

7. Exhibit B to this affidavit is a copy of the notification sent to the candidates in the 1984 election.

8. Timothy A. Brown has campaigned for office and served as delegate to the convention in every election for the last 14 years. He holds graduate degrees from the University of Pennsylvania. He is quite familiar with the requirements for nomination and the procedures for distribution of campaign literature, and is aware that in order to obtain nomination he need only nominate himself at the convention, to which he will be a delegate.

9. By virtue of his campaign activities, Timothy A. Brown had accumulated a mailing list which includes a large number of organization members. Mr. Brown has made regular mailings using his own membership lists for many years. Exhibits C through G are copies of some of these mailings. Additionally, mailings have recently been made by others on Mr. Brown's behalf, using other mailing lists. Exhibits H and I to this affidavit are copies of some of these mailings to offshore Membership Group members, to Pacific Maritime Region members and to ships.

Dated: July 15, 1988

/s/ Robert J. Lowen
ROBERT J. LOWEN

State of Maryland
County of Anne Arundel

Signed and sealed before me this 15 day of July, 1988.

/s/ Beverly J. Gutmann,
BEVERLY J. GUMANN
Notary Public
My Commission expires July 1, 1990

LOWEN AFFIDAVIT, EXHIBIT B

[SEAL]

AMERICAN ARBITRATION ASSOCIATION
1730 Rhode Island Ave., N.W., Suite 509
Washington, D.C. 20036 (202) 296-8510

GARYLEE COX
Director
Washington, D.C. Region

August 15, 1984

The International Ballot Committee has now certified your candidacy for ———————— in this year's election. If you desire to send campaign literature to Members of the Organization, mailing labels for the Membership List will be made available to the mailing agency upon payment by you of the required fee as indicated in the attached schedule (see letter of Monarch Information Systems, Inc. dated June 22, 1984) by certified or cashier's check, or money order, made payable to the I.O.M.M.&.P. The check for these labels should be sent by certified mail to Harry Seidman, Comptroller, I.O.M.M.&P., 700 Maritime Blvd., Linthicum Heights, Md. 21090-9998. Upon receipt of such payment by the I.O.M.M.&P., the order for the labels will be placed.

After you have paid the fee for preparing the labels, your campaign literature must be delivered to Ace Advertisers Service, Inc., 200 Hudson Street, New York, New York 10013 who will then print, fold and insert your literature in the envelopes and affix stamps thereto if you so desire upon the payment to them of their required fee. Their fee schedule is also attached (see letter of Ace Advertisers' Service, Inc. dated June 20, 1984). If you prefer, however, you may insert the literature yourself and affix the stamps, thus saving part of the mailing cost and then deliver the sealed envelopes to Ace

for labeling and mailing. We must caution you, however, that according to the U. S. Postal Authorities, if you affix the postage yourself, you may not use metered postage if the meter bears a postmark other than New York City.

Although the letter from Monarch Information Systems, Inc. sets forth a price for gummed labels, the Cheshire labels are less expensive and the mailing service costs set forth in the attached letter from Ace Advertirers' Service, Inc. are based on the use of Cheshire labels. We are informed by the mailing service that the use of gummed labels will result in added costs, but if the literature is inserted by you, and depending upon the size of the stuffed envelope, the use of gummed labels may be required. We suggest you contact Ace in advance to be sure you order the proper type of mailing label.

To enable you to estimate the various costs involved, the Membership figures of the Organization are as follows:

OFFSHORE MEMBERSHIP GROUP	4834
PACIFIC MARITIME REGION	1268
ATLANTIC & GULF MARITIME REGION	1060
PILOTS MEMBERSHIP GROUP	1261
GOVERNMENT EMPLOYEES	205
COMMUNICATION/ELECTRONICS MEMBERSHIP GROUP American Radio Association-MM&P	355
GREAT LAKES & RIVERS MEMBERSHIP GROUP	374

NOTE: Since no International Organization of Masters, Mates & Pilots Election Supplement is being published and distributed, this provides an opportunity to communicate with the membership.

Sincerely yours,

/s/ Garylee Cox
GARYLEE COX
Regional Director

Enclosures

EXCERPTS FROM TRANSCRIPT OF HEARING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JFM 88-1994

BROWN,

Plaintiff,

v.

LOWEN, *et al.*,

Defendants.

Baltimore, Maryland

July 25, 1988

The above-captioned matter came on for hearing re Motion for Application for a Temporary Restraining Order before the Honorable J. Frederick Motz.

APPEARANCES

PAUL A. LEVY, ESQ., on behalf of the Plaintiff.

W. MICHEL PIERSON, ESQ., on behalf of the Defendant.

* * * *

[2] THE COURT: All right. Are you all going—is this all going to be a legal argument? I'm wondering whether Ms. Maraz, the courtroom clerk, needs to stay here.

MR. LEVY: Your Honor, there are—a subpoena, a trial subpoena was served on us this morning. I agreed to accept service of any trial subpoenas by facsimile machine. I was advised at what might be in a subpoena. However, given the five hours between the scheduled

hearing and the actual hearing, I have been unable to fly the [3] Plaintiff up. In my view, however, it is not the facts which they say or at least as I understand it, they say they want to get from Mr. Brown will not affect the outcome of the case.

THE COURT: Well, let's see how far we go—are there going to be exhibits or things of that nature?—

MR. PIERSON: Your Honor, I don't want to be confusing or confused, but it seems to me the Court's suggestion that we see which way it goes might be the better way to do it.

THE COURT: All right.

MR. PIERSON: As I see it—

THE COURT: All right.

MR. PIERSON: —the case possibly can be disposed of entirely on legal issues based on the affidavits that have been submitted.

THE COURT: All right. Well, that was submitted by all of them—

MR. PIERSON: Insofar as the factual conflicts, we would want the right to present evidence if they become important.

[4] THE COURT: Well, I tell you what, if you've got anything to do, why don't you—if you want to go back to your office, you can, and if I need you, I'll call you, if there are exhibits here, or else you're welcome to stay, whichever you prefer, but I can swear the witnesses—if we get witnesses, I can swear the witnesses.

* * * *

[12] [MR. PIERSON:] * * * as I say, all of this, I don't think we have to get to this point because my position is on Donovan, and it's open and shut. I mean, we've got a reasonable rule, and that's, it stops right there. But I do think that that is to the extent that we get into the equities on each side, at this point making a mailing to eight thousand members I think weighs heavily against granting this type of request, particularly when the evidence also shows, and our subpoena would go to this, also, that Mr. Brown has been, has been making mailings

to the membership through the Tim Brown Newsletter for years and years before this, and this whole picture that's created in the moving papers of the, of the beleaguered dissidents against the Union despots in the oligarchy is really, I think, a false picture. And the entire issue of communications with the membership is one I don't think that we need to get into because of the application of the Donovan case.

[13] I think it's a false picture, anyway, but that is really, that gets into disputed factual issues that the Court would need to resolve. But it seems to me at this point, as the Donovan court said, you're much better off with a rule that everybody knows what the rule is, it's been the same rule for elections and elections.

* * * *

[16] THE COURT: But the question is, is it, is it fulfilling the—is it sufficient to fulfill the purposes of the Act?

MR. PIERSON: Well, I don't know how the Court could undertake to make that determination in a vacuum, though.

THE COURT: Well, that's, that's correct.

MR. PIERSON: Now, I will say this.

[17] THE COURT: But it seems to me, it seems to me it's pretty much undisputed on the record that you have a very far-flung membership who are often not at home.

* * * *

[40] THE COURT: When was the last newsletter?

MR. PIERSON: The last Union paper? I, I'm going to have to consult with co-counsel.

Okay, there—Mr. Epstein says notice of nominations for the upcoming election went out last week. I think that's a special issue of the paper, is it not?

THE COURT: So certainly something could have been included there, we're changing our rules.

* * * *

[41] MR. PIERSON: Well, in that case, I would want, I would want the opportunity to put on evidence as

was put on in the Donovan case in terms of voting patterns in this Union and all the factors that were referred to in the Donovan case so that the Court would have a factual record to determine reasonableness, unreasonableness, instead of sitting in a vacuum and determining what's reasonable. It seems to me—

[42] THE COURT: Well, voting patterns may have something to do with it looking back over the past, but I mean, I think it's per se reasonable. I mean, in terms of—you could talk about a principle of union democracy. You're telling me that I can't say as a matter of law that it's reasonable to want to have people thinking about this a month before a convention? I mean, you know, it makes perfect sense from a political standpoint that you want the delegates, you want them to have been thinking about it before they get to the convention because then you come up and introduce yourself, and you're talking about people who presumably are leaders of the locals, that's why they've been elected as delegates, so that the dynamics, the very dynamics of the political process are such that you want to have that going at the convention. And you say I need a factual record not to say that it's reasonable to want that to happen?

MR. PIERSON: Well, the—well, yes. In the context following, is it reasonable in light of the Union rule that says it's done another way, or to turn it around the other way, is, can the Court say that the Union's rule is per se unreasonable in saying, in denying this request?

* * * *

[47] THE COURT: So what do you think? What do you think the evidence is going to show in terms of voting performance?

MR. PIERSON: I think the evidence would show that elections in the Masters, Mates & Pilots have been hotly contested for several years, that it is common in those elections that campaign literature goes out from all sorts of [48] sources before and during the balloting period, that members know that campaign literature is

going to be coming to them and expect it to come to them, and that members vote throughout the ninety-day balloting period.

THE COURT: So you would say how much time, how much time—if they want the literature, they'd have at least half, under the application procedures, so I'm clear exactly what you say the timing would be on this, for the mailing going out and then the election. You have the convention—

MR. PIERSON: The convention ends August 24th.

THE COURT: Right.

MR. PIERSON: Ballots presumably, and I'm not making a representation, I'm talking about evidence based upon the affidavit that we have submitted to the Court, I have no idea when they would go out except I know in '80 and '84 they went out thirty days, so I think the evidence shows that the ballots would be likely to go out thirty days after the convention ended.

THE COURT: All right.

MR. PIERSON: Now—

[49] THE COURT: And what's the, and the election is what? How many times, days after the election—that's what's ninety days?

MR. PIERSON: That's ninety days.

THE COURT: After the election?

MR. PIERSON: After the convention.

THE COURT: After the convention?

MR. PIERSON: No, no, no, no; after the ballots.

THE COURT: After the ballots?

MR. PIERSON: After the ballots are mailed. It's thirty days, and then the election is ninety days, continues for—

THE COURT: And when can they send out their mailings?

MR. PIERSON: Well, they can send out their mailings as soon as the impartial balloting agency selects the mailing service and then sends them the letter telling them the conditions.

Now, frankly, I'm not prepared at this moment to make a representation to the Court as to when that [50] would be. I would have to—

THE COURT: Before or after the ballots goes out?

MR. PIERSON: Oh, that's well before the ballots go out. Well before the ballots go out.

I mean, I don't, I can't guarantee the Court—what Mr. Levy was saying to the Court was that—

THE COURT: That he was saying something about cutting into the ninety days.

MR. PIERSON: What he was saying is the convention ends August the 24th and the, the—let's assume that the convention ends August the 24th and the ballots go out September the 24th, thirty days afterwards. He was saying I couldn't guarantee the Court that the literature could get, could get out a full thirty days before the ballots because they have to select the impartial mailing service, so that there could be some slippage in there in terms of that thirty days.

In other words, I'm saying to the Court that I would anticipate that he could get his literature out in the mail some period of time before the ballots go out.

[51] THE COURT: It's ninety days plus, but it's, it's going to be less than a hundred and twenty because they've got to pick—

MR. PIERSON: Right, so it would be—yeah, and I can't tell the Court how many days slippage, but it would be approximately a hundred and twenty, is the full period after the nomination and before the balloting closes.

* * * *

[61] THE COURT: Well, I'm going to grant the Order. The question clearly is not an easy one, but I think that it's appropriate here to grant the relief which the [62] Plaintiff requests.

To the extent that the cases have held that the inquiry should be simply is the Union's rule reasonable and to the extent that that holding implies that a court should

give deference to the Union's evaluation of what is appropriate in this context, I think the case is wrongly decided. The statute does draw distinctions between those which focus on reasonable rules in which you, deference certainly should be given to the Union's determination, and this situation, where the focus is not upon the Union's rule but upon the reasonableness of the request.

I'm not prepared on this short notice, at least, to articulate fully what the test should be. I think the focus of the test should be does the rule—well, let me step back for a minute.

I certainly think that they are, the Union is entitled to have a rule. I start from that premise. I think that, absent that, the Union is caught in an irreconcilable bind because I think you need to be concerned about having rules applicable to everyone, known to everyone in advance as a general proposition. I think that the [63] principles of nondiscrimination require that in any—and in light of that principle, which is entirely a proper one, any kind of reasonable management requires that the Union be allowed to have a rule.

But I think the focus of that rule needs to be, does it exclude reasonable requests? And that is a bit vague. I think Mr. Pierson has properly argued that a rule which is too vague is virtually no rule at all, and I understand that position. On the other hand, as I said, I don't think that this is an area in which the Court should give deference to the Union's rule which an inquiry, an inquiry simply saying is the rule reasonable necessarily implies.

I think it's encumbent upon the Court to take a de novo review of the rule in question and inquire, does it properly accommodate the two interests which need to be accommodated? Those of nondiscrimination, on the one hand, and secondly of preserving the principle and furthering the principle of union democracy on the other and balancing that here.

I have no doubt in my mind that the rule which [64] has been adopted by the Union is invalid because I do not

think that it provides for sufficient opportunity for communication of ideas by a candidate or a would-be candidate to provide a gestation period which democratic principles require. Indeed, I feel that so strongly and despite what I've said thus far about the fact that I think the test has been wrong, I would find here under the Third Circuit test that the rule is unreasonable.

I think that, per se, a rule which excludes preconvention mailings is unreasonable, even though the balloting is done after the election. It seems to me that the political process is such that a candidate or a would-be candidate is entitled to have union leaders coming to a convention where there is that period of exchange right there to discuss, to thing about his or her candidacy before the convention, to be able prepared to discuss it while they're there, and to give him an opportunity to persuade those leaders that he is the person who should be the candidate so they can do back to their locals and, that he has persuaded them to have, to have them espouse his cause, his or her cause.

[65] So I find that under all of those, the rule here fails. I am not going to require a bond. It seems to me that the risk of a cost of a re-election is one properly borne by the Union.

I have been concerned, in thinking about this before—I think some of my questions reflected it—I was concerned about the timing of this, all sort of from a latchet standpoint whether Mr. Brown should have brought this earlier because of the Union's, I thing in good faith, articulated concern about nondiscrimination.

But I am persuaded from what Mr. Levy told me that, in fact, Mr. Brown's timing was not inappropriate in this case. I think that a May request of the GEB was timely. I think if this case had come before me before a request had been made of the GEB, I would have said send this to the GEB, and it might have been that I would have sent them with an implicit message which might have caused them to take a different stance than

they ended up taking, but that's a, that's a different question.

It seems to me here that the question is, did Mr. Brown so delay as to make it essentially unfair and [66] against the public interest for him to succeed, and I'm persuaded that he did not, that he moved with reasonable expedition, I find he, his raised question would certainly raise, raised issues which, substantial issues going to the merits. I find that the balance of hardships weighs in his favor. But, most importantly, that the public interest and the principle of union democracy, and I have weighed against that there's nondiscrimination concern, compels the conclusion which I have reached.

So I am signing a modified Order.

MR. PIERSON: I have three matters of a technical nature, Your Honor.

THE COURT: Certainly, certainly.

MR. PI7RSON: First of all, I would assume that the Order that the Court is signing is under Rule 65-A; that is, it is a preliminary injunction and not a temporary restraining order. I just don't want to be fouled up on appealability. I mean, I'm taking it, this is an appealable Order.

THE COURT: Well, I certainly intend to make this appealable. I mean, if there's no objection to making [67] it a preliminary injunction, let's do it. I mean, I think this is a question which is appropriately reviewed by the Fourth Circuit, and so if it's necessary to make that the preliminary injunction, then let's go.

MR. LEVY: I have no objection to that, Your Honor.

THE COURT: Let's make it clear on the record that it is a preliminary injunction then and it's appealable.

MR. PIERSON: Question Two, I just want to make my position clear, I don't want to be, anybody to feel I'm sandbagging this court, is that I think the Court should hear testimony, and I've explained to the Court why. Your Honor doesn't feel it's necessary, but I just want to make that position clear on the record.

THE COURT: No, no, I thing that's—I appreciate your, your telling me that, but in terms of the proffer, I mean, but—

MR. PIERSON: Okay.

THE COURT: If there's anything that I've said which is factually inaccurate, as I say, I'm prepared to hold as a matter of law that a preconvention, a rule which [68] prevents preconvention mailings is, is, per se, invalid, so that issue is clear that—I mean, I don't think the facts would go to that issue, would they?

MR. PIERSON: I undertand that. I don't want to, in any way, argue with the Court's ruling.

THE COURT: No, no, no. I appreciate your, your wanting to do this for me.

MR. PIERSON: I'm troubled by—of course, I'm, everybody's always troubled institutionally by cases that come before the Court this quickly and are decided on affidavits and representations and that kind of thing, but I'm, I am troubled, as I indicated to the Court before, by the fact that it's, I think it really is being decided in a vacuum, and I understand the Court's position it doesn't need any more than what it had already, but—

THE COURT: I understand that, and I think—and certainly an appropriate point on appeal is that there should have been a factual record, but—

MR. PIERSON: And then third and finally is the question of stay.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civ. No. HAR 88-1994

TIMOTHY A. BROWN,
Defendants.

v.

ROBERT J. LOWEN, F. ELWOOD KYSER, and
INTERNATIONAL ORGANIZATION OF MASTERS,
MATES, AND PILOTS,
Plaintiff,

ORDER

The Court finds that plaintiff is likely to succeed on the merits, that the balance of hardships is decidedly in favor of the plaintiff, and that the public interest favors preliminary relief. Accordingly, IT IS HEREBY ORDERED THAT

1. Defendants Robert Lowen, Elwood Kyser, and International Organization of Masters, Mates, and Pilots ("IOMMP") shall, within forty-eight hours, and again in response to any future requests, deliver a set of Cheshire labels bearing the names and addresses of all members of the IOMMP who are eligible to vote in upcoming election of officers, or any groups of members requested by Brown whose names can be segregated by the computer on which the list is kept, to a mailing service which is acceptable to the parties and which is capable of mailing plaintiff Brown's literature by the use of such labels.

2. Plaintiff Brown shall pay to defendant IOMMP $100 for the cost of preparing a set of mailing labels. Plaintiff Brown shall also be responsible for all costs of the mailing service.

Dated: July 25, 1988

/s/ J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HAR-88-1994

TIMOTHY A. BROWN,

v.

ROBERT J. LOWEN, *et al.*

MEMORANDUM

The purpose of this memorandum is to restate briefly the reasons recited by this Court on the record on July 25, 1988 for the issuance of a preliminary injunction.

Plaintiff is running for president of the International Organization of Masters, Mates and Pilots ("IOMMP"). The preliminary injunction which he has sought and which this Court has issued requires defendants to mail his campaign literature to the union membership at his own expense. The critical issue presented in this case is the validity of an IOMMP rule which permits the distribution of campaign literature only after IOMMP's convention has been held and approximately ninety days before the election ballots which are distributed after the convention to the membership must be returned.

A threshold question is presented as to the standard by which this Court is to review IOMMP's rule. Defendants contend that the inquiry which his Court must make is whether the rule is "reasonable." This Court does not agree. 29 U.S.C. Section 481(c) clearly provides that unions and their officers "shall be under a duty, enforceable at the suit of any bona fide candidates . . . to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization." This mandate could not be more clear. Thus, although a union certainly may—indeed should—adopt a rule known to all candidates in advance setting forth the terms and conditions under which campaign literature will be distributed by the union, in evaluating the validity of the rule a court must inquire not simply whether the rule may be said to be "reasonable" but whether its application results in the rejection of a reasonable request made by a candidate. The IOMMP rule here in question unquestionably has that effect since the request being made by plaintiff—to distribute his campaign literature approximately one month before the union's convention is held—is clearly reasonable.

Even if the standard of review is the "reasonableness" of the IOMMP's rule, this Court finds that the rule is unreasonable.

First, a rule which prohibits pre-convention distribution of campaign literature is per se unreasonable. Although under IOMMP's constitution a candidate may self-nominate himself at the convention, the dynamics of the political process are such that in order to promote an effective candidacy, a non-incumbent candidate must have the opportunity to have the convention delegates consider the merits of his candidacy before they assemble. These delegates are leaders of their local unions, and it is obviously important to a candidate to attempt to elicit their support in order to have them work for them during the post-convention election process. It is virtually impossible for a non-incumbent candidate to engender such support at the convention itself without having had an opportunity to introduce himself and his ideas by mail-

ings made prior to the convention. A lawyer might as well walk into trial unprepared.

Second, although a ninety day period between the time that campaign literature is sent out and the time that ballots must be returned may seem reasonable on its face, it is undisputed that the nature of the work of the members of the union takes them away from home for substantial periods of time. This is the very reason for the relatively long ninety day period for the return of ballots. Under these circumstances while it may be that the campaign literature will have been distributed to the union members by the time that they exercise their vote, it is unrealistic to believe that union members will have conferred with one another concerning the merits of the respective candidacies before casting their ballots within the ninety day period. This underscores the need for an earlier mailing.

It is for these reasons that this Court entered a preliminary injunction in favor of plaintiff. This injunction is stayed pending defendants' seeking to obtain a decision from a Judge of the Fourth Circuit either reversing the granting of the injunction or continuing the stay pending review of the injunction by a full panel of the Court.

Date: July 24, 1988 /s/ J. Frederick Motz
J. FREDERICK MOTZ
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2876

TIMOTHY A. BROWN,
Plaintiff-Appellee,
v.

ROBERT J. LOWEN, F. ELWOOD KYSER, and
INTERNATIONAL ORGANIZATION OF MASTERS,
MATES, AND PILOTS,
Defendants-Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (C.A. 88-1994-JFM)

Argued: July 28, 1988 Decided: September 14, 1988

Before RUSSELL, WIDENER and HALL, Circuit Judges.

W. Michel Pierson for Appellants. Paul Alan Levy (Arthur L. Fox, II; Alan B. Morrison, PUBLIC CITIZEN LITIGATION GROUP on brief) for Appellee.

OPINION

RUSSELL, Circuit Judge.

This appeal is from an order of the district court issuing a preliminary injunction in favor of the plaintiff, Timothy Brown. Plaintiff is a candidate for president of the International Organization of Masters, Mates and Pilots (IOMMP) of which defendant, Robert Lowen, is the current president. The district court has ordered IOMMP to provide plaintiff with mailing labels containing the names and addresses of voting members of the union. Though the order of the district judge related to an application for a preliminary injunction, the granting of the motion in effect constituted a decision on the merits. According, we have reviewed this case on the merits, doing so, we affirm the decision of the district court as one on the merits.

IOMMP is a labor organization comprised of workers in the maritime industry. The union conducts quadrennial elections of its officers. Nominations of candidates for these offices are made at the union's convention. Any eligible member of the union may be nominated. To be eligible a person need be a union member in good standing. A member may even nominate himself. Ballots containing the names of those nominated are then mailed to members of the union not sooner than ten days nor later than thirty days after the end of the convention. The union then allows ninety days from the mailing of the ballots until they must be returned.

The crux of this dispute arises from plaintiff's desire to distribute campaign literature, at his own expense, to the union's membership before the nominating convention. Only through the union can plaintiff obtain a complete list of the union membership with their addresses. However, the procedures used by the union provide that "[t]he right to distribution of literature only commences after the nomination procedure is complete."

The Labor-Management Reporting and Disclosure Act of 1959 at 29 U.S.C. § 481(c), however, provides in pertinent part that unions and their officers "shall be under a duty, enforceable at the suit of any bona fide candidate for office . . . to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization. . . ." It is on this provision of the Act that the plaintiff relies for his right to have his campaign material mailed to union members within thirty days before the quadrennial meeting of the union.

The Act seems plain on its face: If the request to distribute by one qualified to be a candidate for union office, even though he is yet to be nominated is "reasonable" the union is required to "comply with all [such] reasonable requests." This language conditions the right of the contesting union office seeker to have his campaign material distributed only on the reasonableness of his request. If his request is reasonable, the language of the statute granting the request is mandatory. Whether the request is reasonable is a matter to be determined consistent "with the Act's command to unions to conduct 'free and democratic' union elections." *Steelworkers v. Usery*, 429 U.S. 305, 309 (1977). Accordingly, it can be said that the candidate's request is reasonable the statute upholds the right of the candidate to have his request granted. Such conclusion is nothing more than a reading of the plain language of the statute and, as we said recently in *United States v. Morison*, 844 F.2d 1057, 1064 (4th Cir. 1988), when the terms of "a statute are unambiguous on their face, or in light of ordinary principles of statutory interpretation, then judicial inquiry is complete (citations omitted)." We find that whether the plaintiff is entitled to have his request granted depends entirely on whether his request may be said to be reasonable.

Our reading of the statute accords with the administrative construction of the statute's mandate as declared by the Secretary of Labor, to whom the enforcement of the statute is entrusted. The Department of Labor has repeatedly declared that the statutory command is to be observed if it is reasonable. It has stated categorically that, under its construction of the statute, the critical issue is not whether the union's rules or by-laws are reasonable (as the union argues) but whether the request of the plaintiff is reasonable, primarily in its timing. Indeed, in a letter to the union regarding this specific request of the plaintiff, the Director of the Office of Elections, Trusteeships and International Union Audits of the Department of Labor, advised that

> A self-professed candidate is entitled to make campaign literature mailings at his own expense and may ask the union to have them sent within a reasonable period of time prior to the election. In the present situation, a request for a mailing to be made approximately one month prior to nominations would appear to be reasonable. Failure or refusal by the union to honor a legitimate mailing request is a continuing violation of Title IV which might, under certain circumstances, affect the outcome of the election.

While this opinion of the Department is not binding, it is an opinion entitled to consideration by this Court and is not to be lightly disregarded.

Moreover, this opinion of the Department seems to be in clear accord with Congress' intent of "insur[ing] union democracy" in its enactment of 11 U.S.C. § 481. Professor Clyde Summers who authored a "Bill of Rights for Union Members" which formed the basis of the statute in question, has stated that "[t]he declared and unquestioned purpose of Congress was to ensure fair and democratic elections. Congress recognized that one of the major obstacles to meaningful elections was the inherent

advantage of incumbents and it sought to curb the advantage." Summers, *Democracy In A One-Party State: Perspectives From Landrum-Griffin*, 43 Md. L. Rev. 93, 117-118 (1984). When the union bureaucracy has exclusive control of the union membership lists, with addresses, as in this case, and that bureaucracy has continuous contact with the union membership and particularly the local union officers, the advantages of incumbency over any attempt of an insurgent to promote his candidacy before or after the quadrennial nominating convention of the union are obvious. By requiring unions to comply with all reasonable requests of candidates for access to the union lists these advantages of incumbency are reasonably moderated. And it was to provide that very moderation of the advantages of incumbency which was the intention of the Act.

There does not seem to be any contention that the request of the plaintiff herein is unreasonable. Nor do we understand the union to argue that plaintiff's request is unreasonable. Its position is that the union by-laws provide that "[t]he right to distribution of [campaign] literature only commences after the nomination procedure is complete." Whether intended or not, the manifest result of this is to delay the insurgent candidate in beginning his campaign and to reduce the time within which he can make his appeal to the voters. The incumbents, however, have had four years in which they have enjoyed the exclusive right to the voter lists and addresses and to cultivate their relations with the local union officers who would be expected to have the greatest influence with the rank and file. During all this time, too, the incumbents had had control over the union press and its newsletter to the members. The advantages of the union by-law to the incumbent cannot be questioned. However, the union justifies its by-law as a reasonable method of satisfying the Act's prohibition against "discrimination in favor of or against any candidate with respect to the use

of lists of members. . . ." Beyond that, it takes the position that the relevant reasonableness standard is not the one to be applied in determining the reasonableness of the insurgent's request, but is the one to be applied in determining the reasonableness of the union's restraint on the right to have his "reasonable request" granted. We are not persuaded by the union's reasoning.

In the first place, we find nothing discriminatory in granting the plaintiff's request made within thirty days of the quadrennial convention, since any candidate, whether an incumbent or an insurgent, has the same rights as the plaintiff. Granting the plaintiff's request is simply an attempt at a partial redress of the advantage the incumbent has; it is not an attempt at hobbling or gaining any advantage over any other candidate. The union has identified no way in which granting the plaintiff's request will operate as a discrimination against any other possible candidate for union office. Actually, the granting of the request simply reduces the discrimination of exclusive control by the union incumbents over the electoral lists. There is no conceivable way in which the granting of plaintiff's request will work a discrimination against any other union member.

Neither do we agree with the union that the question posed by this controversy is the reasonableness of the union's by-law. The criterion for resolving this controversy is the reasonableness of the plaintiff's request. Of course, in assessing the reasonableness of the request it is entirely proper to consider whether granting the request would work a discrimination against other candidates. But that question is to considered as a part of the question whether the plaintiff's request was reasonable. So far as we are able to understand, the union does not urge in objection to plaintiff's claim that the granting of his request will result in any discrimination. And well they could not, since any other candidate could exercise exactly the same right as that requested by the plaintiff.

It follows that we find no basis in this record for excusing the union from conforming with the plain command of the statute. It certainly stands the statute on its head to do as the union argues by making the issue the reasonableness of the union by-law rather than, as the statute declares, making the issue the reasonableness of the plaintiff's request. The command of the statute may not legitimately be subordinated to the somewhat ambiguous language of a union by-law. Such a rule would render union by-laws superior to the congressional mandate and would provide dissident unions with a ready means for nullifying the statute's command. We are not disposed to uphold such a misconception of congressional power in this field. We think the district court ruled correctly in granting relief to the plaintiff.

We are aware that our judgment is contrary to that of the Third Circuit as expressed in *Donovan v. Metropolitan District Council of Carpenters*, 797 F.2d 140 (3d Cir. 1986). In that case, the Third Circuit upheld the union's decision not to release mailing labels prior to a certain date because "[t]he union's rule here was a reasonable one." *Ibid.* at 144. As we have previously stated, we believe the test to be not whether the union's rule was reasonable but whether the candidate's request was reasonable. For this reason, we respectfully disagree with the judgment of the Third Circuit.

Accordingly, the judgment of the district court is

AFFIRMED.

HALL, Circuit Judge, dissenting:

I cannot agree with the majority that IOMMP has failed to comply with its duty to honor a reasonable request by a candidate for union office. In my view, a request for mailing that conflicts with the established internal procedures of a union is *per se* unreasonable unless the union's procedures are shown to be unfair or discriminatory. By affirming the district court's contrary conclusion, the majority has today adopted an unduly restrictive interpretation of the Labor Management Reporting and Disclosure Act ("LMRDA" or "the Act") that is inconsistent with the statutory purpose and in clear conflict with the decisions of two of our sister circuits.

As the majority correctly recognizes, the Act implements Congress' clearly expressed desire to promote "union democracy." I further agree that, as a corrollary to that goal, the statute prohibits undue electoral discrimination in favor of incumbents. Democracy, however, is not a standardless expression of majority rule but, rather, a system of ordered liberty in which the will of the electorate is determined through fair and equitable procedures. In this case there has been no finding or even persuasive suggestion that IOMMP's election procedures limiting candidate mailings until after the formal nomination process is unfair, discriminatory, or provides any undue advantage to incumbents. The majority, as did the district court, has concluded, however, that the fairness of the union's rules is irrelevant and that the reasonableness of a would-be candidate's request is to be assessed solely by examining the request itself.[1] In my view that approach is not only simplistic but also threatens the broader goals of the Act.

[1] Contrary to the majority's suggestion, the union has sought to argue that appellee's request for mailing was unreasonable. The union simply bases its argument, in a broader context, than the majority is willing to consider.

In the first instance, the reasonablessness of any action requires consideration of the underlying factual context. A request to light a candle in a darkened room may seem eminently reasonable if examined in isolation but when the same request is made in a room filled with gas fumes, the reaonableness is substantially diminished. While appellee Brown's request that the union mail his campaign literature without regard to its established procedure may have carried less explosive potential, the request was nontheless a clear threat to the union's ability to organize its own internal affairs.

The Supreme Court has recognized that the LMRDA was not intended to "undermine union self-government." *United Steelworkers of America v. Sadlowski*, 457 U.S. 102, 117 (1982). Moreover, the Court noted that although incumbency carries certain undoubted natural advantages, it should not be overstated. *Id.* at 114. Logically, the Act does not sanction judicial intrusion into union internal matters unless the union has unfairly distorted the normal democratic process to favor incumbents. I can see no indication that IOMMP's rules which appellee seeks to avoid would accomplish that end.

Both the Third Circuit in *Donovan v. Metropolitan District Council of Carpenters*, 797 F.2d 140 (3d Cir. 1986), and Ninth Circuit in *Marshall v. Provision House Workers Union, Local 274, Amalgamated Meat Cutters and Butcher Workers*, 623 F.2d 1322 (9th Cir. 1980), have concluded that a candidate's compliance with reasonable nondiscriminatory union procedures is relevant to whether a mailing request is itself reasonable. I would agree completely with the *Donovan* court that fair uniform rules which avoid even the "appearance of disparate treatment" and minimize the likelihood of "needless judicial second guessing." *Donovan*, 797 F.2d at 144 are not to be treated lightly in judicial proceedings.

In contrast to the salutary doctrine developed in the Third and Ninth Circuits, the majority has concluded that

unions are without power to structure their own electoral process even when that process serves the Act's broader purposes of promoting union democracy. I cannot accept this section 481(c) of the statute requires such an irrational result.[2] Accordingly, I would reverse the district court and, therefore, I respectfully dissent from the majority's decision.

[2] I find little significance in the fact that the Secretary of Labor has taken a position in this case similar to that articulated by the majority. While the views of the administrative agency to which statutory enforcement is entrusted are entitled to some deference, we need not accept those views blindly. In this instance, the Secretary's position is not only contrary to reasonable statutory interpretation, it is also arguably in conflict with his own regulations. At 29 C.F.R. § 452.67, the Department of Labor clearly envisions that distribution of campaign literature may be subject to rules governing the methods of distribution and requires the union to inform all candidates of the nature of those conditions. The Secretary's instant position renders any such distribution rules superfluous.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2876

TIMOTHY A. BROWN,
Plaintiff-Appellee,

v.

ROBERT J. LOWEN, F. ELWOOD KYSER,
INTERNATIONAL ORGANIZATION OF MASTERS,
MATES AND PILOTS,
Defendant-Appellants.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

Argued: April 10, 1989 Decided: November 17, 1989

Before ERVIN, Chief Judge, and RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, CHAPMAN, WILKINSON, and WILKINS, Circuit Judges.

W. Michel Pierson for Appellant. Paul Alan Levy (Arthur L. Fox, II, Alan B. Morrison, PUBLIC CITIZEN LITIGATION GROUP, on brief) for Appellee. Helen Boetticher, Counsel for Litigation (Jerry G. Thorn, Acting Solicitor; John F. Depenbrock, Associate Solicitor;

Barton S. Widom, Deputy Associate Solicitor; Sharon E. Hanley, U.S. DEPARTMENT OF LABOR, on brief) for Amicus Curiae.

PER CURAM:

The en banc court adopts the majority panel opinion sustaining the district court's grant of an affirmative injunction in favor of the plaintiff-appellee against the defendant's appellants, as its opinion herein. *Brown v. Lowen*, 857 F.2d 216 (4th Cir. 1989). Judge Hall, however, adheres to his dissent to the panel opinion and relies on it in dissent to the en banc decision herein, and Judge Phillips in joining Judge Hall's dissent has filed a separate dissenting statement of his views.

AFFIRMED.

PHILLIPS, Circuit Judge, dissenting:

I agree with Judge Hall's view, and that of the Third and Ninth Circuits, as I understand them, that the first step in assessing the reasonablessness, under § 481(c), of a candidate's request that is at odds with a union's general rule on the subject, is to consider whether the general rule is unfair or arbitrary in its general application. If a union's general rule is not unfair or arbitrary in its general application, then a candidate's request to be exempted from its requirements is obviously "unresonable." If this is not so, then there is little reason for unions to attempt to regulate election procedures by general rules. All of us can probably demonstrate from time to time that general rules of one kind or another—from traffic laws to income tax laws—are unreasonable in their particular applications to us, hence that our request for specific exemptions would be "reasonable" if assessed independently of the general rule's justification. For democracy to work in union affairs as in affairs at large, however, it must be considered unreasonable for

an individual to insist upon being made a special case, exempt from the requirements of general laws that are not fair or arbitrary in their general application.

Because the district court failed to apply this principle, I would vacate the preliminary injunction and remand for further proceedings faithful to it.

(5)

No. 89-1330

FILED
AUG 10 1990
JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, ROBERT J. LOWEN, and F. ELWOOD KYSER,
Petitioners,

v.

TIMOTHY A. BROWN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' BRIEF

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QUESTION PRESENTED

Whether the Court of Appeals decision, which precludes consideration of the union's rule regulating distribution of union campaign literature in the determination of whether Brown's non-complying request to distribute literature was reasonable under section 401(c) of the Labor-Management Reporting and Disclosure Act, is erroneous in light of the statute's goals and legislative history.

LIST OF PARTIES

The parties are listed in the caption.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1330

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, ROBERT J. LOWEN, and F. ELWOOD KYSER,
Petitioners,

v.

TIMOTHY A. BROWN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' BRIEF

OPINIONS BELOW

The opinions of the panel of the Fourth Circuit which initially decided the case on September 14, 1988 are reported at 857 F.2d 216 and are included in the Joint Appendix at page 79. The opinions entered on rehearing en banc are reported at 889 F.2d 58 and are included in the Joint Appendix at page 89. The opinion of the district court is unreported and is included in the Joint Appendix at page 76.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on November 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). A Writ of Certiorari was granted June 18, 1990.

STATUTES INVOLVED

Section 401(c), Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481(c):

> Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within 30 days prior to an election of a labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership therein as a condition of employment, which list shall be maintained

> and kept at the principal office of such labor organization by a designated official thereof. Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots.

STATEMENT OF THE CASE

The International Organization of Masters, Mates & Pilots is a labor organization of about 8,500 members who are employed in various positions related to the maritime industry. The union comprises several membership groups organized along craft lines. For example, the Offshore Membership Group includes deck officers employed aboard deep sea ships; the Pilots Membership Group is made up of pilots; and the Pacific Maritime Region includes officers on various vessels operating on the Pacific Coast.

The highest governing body of the union is the convention (Joint Appendix 17). Regular conventions are held biennially (Joint Appendix 17). Delegates to the convention are elected by the membership of each group. Between conventions, the organization is governed by a General Executive Board, made up of the international officers and the vice-presidents (Joint Appendix 18-19).

Elections of IOMM&P's officers are held quadrennially and are conducted by mail ballot. (Joint Appendix 26). The International President, International Secretary-Treasurer of the union, the vice presidents who head each membership group, other officials and convention delegates are elected by plurality vote, all of whom serve until the next election. (Joint Appendix 25). Candidates for office must satisfy various eligibility requirements, including membership for a certain length of time, continuous good standing for a specified period and qualifying service (Appendix 27).

The procedure for elections is set forth in Article V of the IOMM&P Constitution. (Joint Appendix 24).

Nominations for offices are made at the regular convention preceding the election. (Joint Appendix 29). Nominations may be made by petition or from the floor at the convention. (Appendix 30). A member, who is a delegate to the convention as was respondent, may nominate himself. (Appendix 59). An International Ballot Committee, which supervises the election, is elected at the convention (Joint Appendix 36), and an impartial balloting agency, which conducts the balloting, is also selected by majority vote of the delegates at the convention. (Joint Appendix 26). Article V, § 9 of the Constitution sets forth the balloting procedure. (Joint Appendix 37). The impartial balloting agency, under the supervision of the International Ballot Committee, (Joint Appendix 37) prepares the official ballot and mails it to all members. (Joint Appendix 38). The ballots must be mailed not sooner than ten days nor later than thirty days after the close of the nominating period. (Joint Appendix 38). In the 1980 and 1984 elections, the ballots were mailed on the 30th day. (Joint Appendix 57). The ballot is closed ninety days after the date that the ballots are mailed by the Impartial Balloting Agency. (Joint Appendix 38).

All candidates who are nominated must accept the nomination in writing within ten days. (Joint Appendix 31). Each officer candidate may submit a statement of fact not exceeding 200 words for inclusion on the ballot. (Joint Appendix 31). The International Ballot Committee meets after the convention to review the candidates' qualifications and certify their eligibility. (Joint Appendix 60).

Article V, section 10a governs distribution of campaign literature. It provides:

> Any candidate desiring to distribute literature in connection with his candidacy, as provided under Section 401(c) of the Labor-Management Reporting and Disclosure Act of 1959, shall be required to pay in advance for the cost of such distribution. The amount shall be certified by the independent mailing service as designated by the Impartial Balloting Agency. The Impartial Balloting Agency shall make appropriate arrangements for the security of the mailing list. The Impartial Balloting Agency shall immediately notify the candidates of the name of the mailing service and the cost of distribution of the candidate's literature.

(Joint Appendix 39-40).

When the candidates have been certified as eligible, they are all notified of the procedures for mailing at the same time. (Joint Appendix 39-40). The independent mailing service is designated by the Impartial Balloting Agency. (Joint Appendix 39). Thus, the right to have literature distributed through the union's mailing list only commences after the nomination and certification process is complete. Candidates may make unlimited mailing throughout the balloting period.

On July 11, 1988, Timothy A. Brown filed suit in the United States District Court for the District of Maryland against the IOMM&P, Robert J. Lowen, its International President, and F. Elwood Kyser, its International Secretary-Treasurer. The suit sought an order pursuant to section 401(c) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481 (c), to compel the compliance with his request for distribution of campaign literature. (Joint Appendix 7). With the complaint, Brown filed a motion for a preliminary injunction, with affidavits, expressly seeking all relief that he might obtain by final order. Brown alleged that he intended to be a candidate for the office of International President of the IOMM&P in the election of officers scheduled to commence within thirty days after the Organization's nominating convention on August 22-24, 1988. (Joint Appendix 8).

Brown alleged that he had addressed a request to Kyser on May 9, 1988, to distribute literature prior to

the convention. (Joint Appendix 42). The request was denied on June 7, 1988. (Joint Appendix 44). Brown appealed to the General Executive Board on June 15, 1988, (Joint Appendix 46) and his appeal was denied on July 6, 1988. (Joint Appendix 48).

In an affidavit submitted with his motion, Brown stated the reasons why he desired to make a distribution of literature earlier than the time permitted by the Organization's rule. He stated that he wished members to have his literature to begin consideration of his candidacy at an early date. (Joint Appendix 14). He also stated that he wished to obtain support for his nomination. (Joint Appendix 13).

Although not stated in his papers, Brown was a delegate to the 1988 convention. He had served as a delegate for the preceding 14 years and had campaigned for office in the past. (Joint Appendix 61).

Prior to any action by the District Court, Brown filed a motion for a temporary restraining order, on July 20, 1988, again expressly seeking all relief obtainable by final order. The reason expressed for filing this motion was the fact that process had not been served on defendants. On July 21, 1988, defendants filed a memorandum in opposition to the motion for preliminary injunction, with affidavits.

On July 25, 1988, District Judge J. Frederick Motz heard argument from counsel. (Joint Appendix 64). The court decided that no testimony was necessary and denied the union's request to present evidence. (Joint Appendix 72-73). At the conclusion of the argument, Judge Motz ruled in favor of plaintiff, delivered an oral opinion, and entered an order submitted by plaintiff granting a preliminary injunction compelling the distribution of campaign literature prior to the convention. (Joint Appendix 74). On July 26, 1988, Judge Motz filed a memorandum setting forth additional reasons for his decision. (Joint Appendix 76).

The court ruled that Brown's request was clearly reasonable, and that the appropriate focus was on the request rather than the Organization's rule. It held alternatively that the rule was unreasonable because by excluding preconvention mailing it created an insufficient period for the exchange of ideas among members.

Petitioner appealed to the Fourth Circuit. The district court's order was initially affirmed by a divided three judge panel. Judge Russell, writing for the majority, held that under the language of the statute Brown's rights depended "entirely on whether his request may be said to be reasonable." (Joint Appendix 81). In making this decision, the majority noted that its decision did not consider the reasonableness of union rules. (Joint Appendix 84). Thus, according to the majority, the language of section 401(c) precluded consideration of the request's compliance with the union's rule. The court noted that its conclusion accorded with the view of the Secretary of Labor (Joint Appendix 82). The court stated that it was aware that its view conflicted with that of the Third Circuit, but rejected that Circuit's view. (Joint Appendix 85).

Judge Hall dissented, arguing that the majority's view that "unions are without power to structure their own electoral process even when that process serves the Act's broader purposes of promoting union democracy" was "an irrational result." (Joint Appendix 88). Judge Hall also rejected the deference given to the Secretary's interpretation of section 401(c), stating, "while the views of the administrative agency to which statutory enforcement is entrusted are entitled to some deference, we need not accept those views blindly. In this instance, the Secretary's position is not only contrary to reasonable statutory interpretation, it is also arguably in conflict with his [sic] own regulations." (Joint Appendix 88).

The case was reargued before the court en banc on the union's petition. The en banc court adopted the

majority panel opinion. (Joint Appendix 90). Judge Phillips joined Judge Hall in dissent, stating that "If a union's general rule is not unfair or arbitrary in its general application, then a candidate's request to be exempted from its requirements is obviously 'unreasonable.' If this is not so, then there is little reason for unions to attempt to regulate election procedures by general rules." (Joint Appendix 90).

SUMMARY OF ARGUMENT

In assessing how a union must satisfy its duty to comply with all "reasonable requests" by bona fide candidates for distribution of campaign materials under section 401(c) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), the legislative goals and history must be considered. A review of the statutory scheme reveals that in enforcing the provisions of the LMRDA, the courts should strive to protect the public interest in free and democratic elections while avoiding undue governmental intrusion into a union's internal affairs. Examination of the union's duties in light of these policies reveals that the regulation of distribution of campaign literature for union office by reasonable nondiscriminatory union rules is permitted by section 401 (c). The contrary argument that the reasonableness of the candidate's request should be determined by examination only of the request itself necessitates standardless ad hoc decision making, and in turn, destroys union self-government and harms union democracy. Moreover, the Secretary's support for this interpretation should not be given deference as it is contrary to legislative dictates and the Department of Labor's regulations as well. Finally, the district court's alternative holding that the union's rule was unreasonable cannot be sustained because it was entered without evidence.

ARGUMENT

I. THE LOWER COURTS ERRED IN HOLDING THAT SECTION 401(c) REQUIRED THE GRANTING OF BROWN'S REQUEST TO DISTRIBUTE CAMPAIGN LITERATURE IN VIOLATION OF THE UNION'S REASONABLE NONDISCRIMINATORY RULE

This case poses the issue of whether the underlying goals of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") in promoting free and democratic elections while preserving union self-government are better served by rule-making by the union majority, rather than through ad hoc decision-making by union officials and the courts. Resolution of this issue lies in the construction of section 401(c) of the LMRDA, which sets minimum standards governing a union's distribution of campaign materials and access to membership lists. In interpreting the statute, this court has consistently avoided a literal reading of the LMRDA and has instead looked to its legislative history and underlying goals to determine what construction will best serve the interests of the union, its members, and the public.

Respondent asserted, and the Court of Appeals agreed, that the interest of the individual candidates must receive undivided focus in order to assure the public interest in democratic elections. Specifically, respondent has argued that only by granting maximum freedom to the candidates in their campaign requests, regardless of how they fit in the context of the union's attempt to govern itself, can democracy be furthered. That view reflects a basic misunderstanding of the nature of democracy, which ultimately undermines not only union self-government, but democracy itself.

In contrast, petitioner advocates an interpretation which protects the individual and public interests by acknowledging the basic standards of union conduct established under section 401, while promoting the long-

standing Congressional policy of avoiding undue intrusion into union self-government. Petitioner does not argue that all union rules regulating literature distribution must be blindly applied regardless of whether they are reasonable. Rather, petitioner does contend that the reasonableness of a candidate's request must be assessed in reference to the union's election procedure and its fit with the union's rules for distribution. Therefore, a reasonable nondiscriminatory rule regulating the union's distribution of campaign materials should be obeyed; conversely, a request that violates such a rule is unreasonable.[1]

Petitioner will show (a) why its interpretation of the statute is proper and supports its argument; (b) why that interpretation advances the Congressional goals of the statute; (c) why the construction of the statute by the Secretary of Labor, heavily relied upon by the majority in the Fourth Circuit, should not be entitled to deference; (d) why the lower court's interpretation defeats those purposes and is inconsistent with the legislative history; and (e) why the union's reasonable rule should have been followed.

A. The Language of the Statute Permits Adoption of a Rule Governing Requests to Distribute Literature

The resolution of the issue must begin with the statutory language of section 401(c), which in part requires the union to distribute campaign materials on behalf of the candidates for office. 29 U.S.C. § 481(c). Section 401 also sets forth other standards relating to the procedure for election of union officers, including: nomination of candidates; notice of elections; adequate election safeguards; voting rights; use of campaign funds; and counting and publication of election results. This section is part of Title IV of the Act, which is specifically concerned with elections. Title IV is one of seven titles of the Act; the other titles also establish minimum standards by which a union can govern its internal affairs.

[1] Finally, while this issue is not squarely before this Court, petitioner also urges that this court find that its rule is reasonable, and that considered in the full context of this case, Brown's request was unreasonable.

Section 401(c) specifically provides that unions:

> "[S]hall be under a duty . . . to comply with all reasonable requests of any candidate to distribute . . . campaign literature in aid of such person's candidacy."

29 U.S.C. § 481(c). In the proceedings below, the Fourth Circuit held that the language of the statute required only that the candidate's request be examined to determine if it is reasonable, and that the statute foreclosed consideration of any applicable union rules because section 401(c) spoke only of the request. In support of this interpretation, the courts concluded that to construe the statute otherwise would permit unions to nullify the statute's command. (Joint Appendix 85).

However, the language of the statute does not justify such a broad reading. Section 401(c) does not require a union to comply with all requests, but merely with reasonable requests. Thus, the statute itself limits the sweep of freedom of expression by providing that not all requests must be honored. The statutory language itself precludes an interpretation that gives no consideration to a scope other than maximum freedom of expression.

As section 401(c) only requires a union to comply with "reasonable" requests, the statute places upon the union the duty to determine what requests are reasonable. There are two ways that a union may discharge this duty—ad hoc determination of the reasonableness of each individual request, or adoption of rules or procedures that define, in advance, equal terms and conditions for the granting of requests. The language of section 401(c) itself does not indicate a preferred method for the determination of a request's reasonableness.

Accordingly, the conclusion of the lower courts that the statute directs the court to consider only the request itself, because the adjective "reasonable" precedes the noun "requests," is not supported by the words of the statute. Because the reasonableness standard in reality requires a device for implementation of that standard, it poses the issue of the proper method of implementation. Thus, the "plain" language of the statute does not compel either interpretation.

Furthermore, a moment's reflection suffices to demonstrate that the reasonableness of a candidate's request cannot be measured without reference to the union's election procedure. How possible would it be for a union or court to determine whether a request is reasonable without knowing something about how it related to the structure of the union and the way the election is conducted. The contention that *only* the candidate's request itself may be considered in determining its reasonableness is self-evidently absurd.

It is therefore apparent that nothing in the statute forbids the union to have a rule governing candidates' requests to distribute literature. It is also apparent that nothing in the statute dictates that a court should disregard such a rule in determining whether a request to distribute literature should be granted. Adoption of a published, majority made rule would more fairly and equally regulate such requests.

Moreover, this Court has consistently viewed with disfavor, the "literal" approach advocated by respondents. As stated in *Wirtz v. Local 153, Glass Blowers*, 389 U.S. 463, 88 S.Ct. 643, 19 L.Ed.2d 705 (1968):

> We have cautioned against a literal reading of congressional labor legislation; such legislation is often the product of conflict and compromise between strongly held and opposed views, and its proper construction frequently requires consideration of its wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve. See, e.g., *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 619, 87 S.Ct. 1250, 1255, 18 L.Ed.2d 357 (1967). *The LMRDA is no exception.*

Glass Blowers, 389 U.S. at 468. See also, *Local #82, Furniture & Piano Movers v. Crowley*, 467 U.S. 533, 541, 104 S.Ct. 2557, 2566, 81 L.Ed.2d 4517 (1984).[2] To determine the proper means for construing section 401(c), therefore, this Court must consider the underlying legislative history and goals of the LMRDA.

B. The Legislative Intent Dictates That a Reasonable Nondiscriminatory Union Rule Be Followed

In support of its interpretation of section 401(c), the Fourth Circuit majority focused entirely upon the Congressional intent to foster union democracy. In fact, its focus was so concentrated that it saw that the only purpose of the statute was to offset the alleged advantages enjoyed by incumbent officers. In its view, assuring the candidate the maximum ability to distribute literature was necessary, regardless of what the established election procedures provided. Implicit in its approach was the corollary that any rule limiting distribution was

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[2] This interpretation is supported in a comment by Archibald Cox, who was involved in promulgation of the LMRDA, which has been cited with approval by this court:

> The legislation contains more than its share of problems for judicial interpretation because much of the bill was written on the floor of the Senate or House of Representatives and because many sections contain calculated ambiguities or political compromise essential to secure a majority. Consequently, in resolving them the courts would be well advised to seek out the underlying rationale without placing great emphasis upon close construction of the words.

Glass Blowers, 389 U.S. at 468, n.6, quoting Cox *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*. 58 Mich.L.Rev. 819, 852 (1960).

the creation of the incumbent officers to solidify their grip on their offices.

There is no question that a substantial reason for the enactment of the LMRDA was to safeguard the public and individual union member's interest in union democracy. However, as this Court has noted:

> The legislative history shows that Congress weighed how best to legislate against revealed abuses in union elections without departing needlessly from its long-standing policy against unnecessary governmental intrusion into internal union affairs. The extensive and vigorous debate over Title IV manifested a conflict over the extent to which governmental intervention in this most crucial aspect of internal union affairs was necessary or desirable. In the end there emerged a "general congressional policy to allow unions great latitude in resolving their own internal controversies, and, where that fails, to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts."

Glass Blowers, 389 U.S. at 470, 471, quoting *Calhoon v. Harvey*, 379 U.S. 134, 140, 85 S.Ct. 292, 296, 13 L.Ed.2d 190 (1964). *See also, Hodgson v. Local 6700, USWA*, 403 U.S. 333, 91 S.Ct. 1841, 29 L.Ed.2d 510 (1971); *United Steelworkers of America v. Sadlowski*, 457 U.S. 102, 102 S.Ct. 2339, 72 L.Ed. 707 (1982); *Local 82, Furniture and Piano Movers v. Crowley*, 467 U.S. 533, 104 S.Ct. 2557, 81 L.Ed.2d 457 (1984).

To achieve these competing goals, Congress created a statutory scheme under the LMRDA wherein the unions are authorized to govern their internal affairs, including elections, subject to the standards prescribed in Title IV. *Wirtz v. Hotel, Motel and Club Employees, Local #6*, 391 U.S. 492, 88 S.Ct. 1743, 20 L.Ed.2d 763 (1968). Only when the union violates the standards of Title IV, and particularly section 401, is outside enforcement authorized by the Act. *Hotel, Motel Employees*, 391 U.S. at 498. This approach thus serves the interests of the public, union members and unions, and should guide this Court in the proper construction of section 401(c).

A major defect in the construction given the statute by the Fourth Circuit is that it fails to even consider the Congressional policy encouraging union self-government. There can be no question that forbidding the union to have a rule would undermine a union's autonomy. If the union's rule governing distribution of literature is not to be considered in ascertaining whether a section 401(c) request is reasonable, then the union's power to govern its own affairs is removed to that extent.

Apart from this frontal encroachment upon the union's power, the construction favored by the Fourth Circuit majority undermines union self-government in other ways. Reasonable rules also further other union interests. They permit the union officers to perform other tasks besides meeting to sit as an adjudicatory body each time a request is made. They reduce the necessity for judicial examination of the motives for denial of each request and scrutiny of whether there is a basis for the union's determination.

Even more importantly, forbidding the union to create and enforce election rules also undermines union democracy. If the union is required to decide the reasonableness of each request without reference to the union's election procedures, there is no established standard for assessing reasonableness. This increases the danger of arbitrary decision-making. It also increases the danger of judicial second guessing, because if the union may have no single standard for judging requests, the court must undertake a review of the reasons assigned by the union in each case where a request is denied. This approach has clearly been discouraged by this Court. *Sad-*

lowski, 457 U.S. at 117. ("In drafting Titles II through VI, Congress was guided by the general principle that unions should be left free to 'operate their own affairs, as far as possible,' quoting S.Rep.No. 1684, 85th Cong., 2d Sess., 4-5 (1958). It believed that only essential standards should be imposed by legislation, and that in establishing those standards, great care should be taken not to undermine union self-government. Given certain minimum standards, 'individual members are fully competent to regulate union affairs.' *Ibid.* Thus, for example, in Title IV, which regulates the conduct of union elections, Congress simply set forth certain minimum standards. So long as unions conform with these standards, they are free 'to run their own elections,' quoting *Wirtz v. Glass Bottle Blowers*, 389 U.S. at 471, 88 S.Ct. at 648.")

Finally, even given the Fourth Circuit's single minded focus upon the benefits to insurgents of early mailings,[3] a reasonable rule is still more effective in protecting the interests of the union member and public than the ad hoc decisions. A system inhibiting the efficacy of rules determined according to majority decision at union conventions (Joint Appendix 23) necessarily gives broader control to the union's General Executive Board in responding to requests under section 401(c). As a result, control of the determination of what requests are "reasonable" would be left largely in the hands of the incumbents, and manipulation by them is surely easier where there is no standard to guide the union's decision. Thus, petitioner's interpretation of section 401 is not only dictated by the Congressional goals and history of the LMRDA, but is also necessary to best protect the goals expressed by respondent and the Fourth Circuit. These results have led the other courts that have considered this

[3] Although the Fourth Circuit relied heavily on its belief that the incumbents have an overwhelming advantage against challengers, this Court has noted these advantages are often overemphasized. *Sadlowski*, 457 U.S. at 114-115.

issue to sustain reasonable rules. Their approach is instructive because they considered the statutory goals.

In *Marshall v. Provision House Workers Union, Local 274*, 623 F.2d 1322 (9th Cir. 1980), the Court of Appeals, finding an absence of legislative or judicial definition of "reasonableness" under section 401(c), looked to where this Court had considered reasonableness elsewhere in section 401. That court found that qualification requirements in section 401(e) were also governed by the standard of reasonableness. The court concluded that this was an apt comparison because "rules governing distribution of campaign materials, like qualifications for candidacy, implicate the fairness of union elections." *Provision House*, 623 F.2d at 1325.[4]

Further, the court focused upon the candidates' compliance with the union's rules governing distribution of literature, and found that the union's denial of the requests was proper as the candidates failed to comply with reasonable union election rules. The court rejected the Secretary of Labor's argument that in that case, the union's denial of requests violated section 401(c), because the rules were applied unreasonably. It found that,

> Making exceptions to the rule, by complying with the challengers' late distribution request could have undercut the purpose of the election rules—to eliminate the potential for discrimination among candidates by establishing a uniform set of standards governing all candidates.

Provision House, 623 F.2d at 1326.

[4] This similar standard should be applied to section 401(c) as both it and section 401(e) empower the union to set procedures regarding the conduct of the elections. The approach advocated by respondent undermines self-government by ignoring the union's rules entirely. *Local #3489, United Steelworkers of America v. Usery*, 429 U.S. 305, 97 S.Ct. 611, 50 L.Ed.2d 502 (1977) clearly contemplates that a union's rule should be enforced as long as it does not unfairly or discriminatorily treat the union candidates. 429 U.S. at 312-313. See also, *Sadlowski*, 457 U.S. at 117, quoted *supra*.

Similarly, in *Donovan v. Metropolitan District Council of Carpenters*, 797 F.2d 140 (3d Cir. 1986), the court found that the appropriate standard for determining reasonableness under section 401(c) was whether the rule itself, rather than the request of the candidate, was "reasonable". There, a candidate challenged a union rule which prohibited mailing of campaign materials before a set date. Rules established in January 1984 for an election to be held in June of that year provided that all candidates, upon proper request, would be eligible for authorized mailing labels for mailing literature after April 15, 1984. Complainant made a request that his campaign literature be mailed prior to the April 15th date; based upon the January 1984 rule, his request was denied. The Secretary filed suit to set aside the election. The union council conceded that it was under a duty to comply with reasonable requests to distribute campaign literature, but objected to the Secretary's standards of reasonableness.

In ascertaining whether the rule violated the union's duties under section 401(c), the Secretary contended that the proper test was whether the candidate's request was reasonable rather than focusing on the reasonableness of the union's rule governing requests to distribute literature. After examining the legislative history of section 401(c), the court held that:

> [A] union may adopt and enforce reasonable, nondiscriminatory rules for the distribution of campaign literature in compliance with section 401(c). Unlike the ad hoc balancing test which the Secretary here would require the union leadership to engage in whenever a request for distribution is made, permitting the imposition of uniform rules avoids even the appearance of disparate treatment. Moreover, by minimizing judicial second-guessing, permitting such rules furthers the Act's policy of "balanc[ing] between the public interest in free and democrtaic union elections on the one hand, and the importance

> of minimizing government encroachment on union autonomy, on the other hand."

Metropolitan District, 797 F.2d at 144, quoting *Brennan v. Local 122, Amalgamated Clothing Workers*, 564 F.2d 657, 660 (3d. Cir. 1977).

For these reasons, the Court of Appeals adopted the union reasoning and concluded that no violation of section 401 had occurred. The court concluded that, "although [the candidate] may have had legitimate reasons for wanting earlier mailings, '[w]e must judge the . . . rule not by the burden it imposes on the individual candidate but by its effects on free and democratic elections'" *Metropolitan District*, 797 F.2d at 144, quoting *United Steelworkers*, 429 U.S. at 310-11 n.6.

As the Third Circuit perceived, the fact that granting a request would benefit a candidate, even an insurgent candidate, is not equivalent to furthering free and democratic elections. Furthering democracy is a more subtle process, and involves considerations other than simply granting maximum freedom of expression to everyone.

The Fourth Circuit's view of section 401(c) as simply serving a referee function in contests between insurgents and incumbents blinded it to those other considerations. The statute governs all requests for access to membership lists. It does not apply only to contests where one candidate is an incumbent. By focusing only on the supposed advantages of incumbency, the majority identified democracy with benefit to nonincumbents to the exclusion of other relevant factors.

These cases establish that in assessing the conduct of unions in elections under the dictates of section 401(c), the courts must look to the rule, not the candidate's request. Thus, these cases clearly show that if the candidate's request conflicts with the union's provisions, it is unreasonable *per se* unless the rule is unfair or discriminatory.

C. The Secretary's Interpretation Is Not Entitled to Deference

In further support of its interpretation of section 401(c), respondent and the Fourth Circuit cited to the Secretary of Labor's position that the union's rule should not be considered in determining whether a request is reasonable. However, there are several reasons why the Secretary's interpretation is not entitled to deference in this case. First, the Secretary's regulations do not support the Secretary's interpretation. Second, this is not an appropriate circumstance in which deference to the Secretary is justified.

The position taken by the Secretary was expressed in a letter from Richard Hunsucker, Director of the Department's Office of Elections, Trusteeships and International Union Audits, to respondent. (Joint Appendix 52). Mr. Hunsucker concluded that a request made one month before the nominating convention "would seem to be reasonable." (Joint Appendix 53-54). Mr. Hunsucker, however, stated that a request made "long before the election," would not be reasonable, although he did not explain how to distinguish the two. (Joint Appendix 53).

A review of the Department of Labor regulations, 29 U.S.C. § 452.00 et seq., reveals no express support for the Secretary's interpretation whatsoever. Section 452.67, upon which Mr. Hunsucker primarily relies, provides only that:

> The Act imposes the duty on the Union and its officers to comply with all reasonable requests of any candidate to distribute his campaign literature to the membership at his expense.

29 C.F.R. § 452.67. The section does no more than repeat the statutory language, and does not define the terms used in either the statute or regulations. There is no

dispute in this case that the statute requires a union to honor reasonable requests. The dispute is over how to determine what is a reasonable request. Mere repetition of the statutory language does not advance that inquiry.

The only standard actually set forth in the regulations is the provision of section 452.69 which forbids a union from denying all requests for distribution of literature. Like section 452.67, this adds no content to the statutory command. Clearly, a rule that denied all requests would be inconsistent with "all reasonable requests." [5]

The remaining portion of section 452.67 supports IOMM&P's contention that it is permitted to adopt and enforce a reasonable rule governing the timing of distribution requests. It states that:

> In order to avoid charges of disparity of treatment among candidates, it is advised that a union inform all candidates in advance of the conditions under which distribution will be made and promptly advise them of any change in those conditions.

29 C.F.R. § 452.67.[6] The reference to the imposition of conditions upon the distribution of literature clearly indicates that conditions may be imposed by a union, and that in fact, are encouraged by the Secretary. The goals reflected by this regulation can be best served by established procedures determined at the union convention, which are published and known to all union candidates.

Thus, the regulations do not contain any interpretation which is contrary to that proposed by petitioners. Rather, they tend to support petitioner's construction. As administrative interpretations are instructive only inso-

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[5] Moreover, this regulation is not applicable here as petitioner merely requests the right to govern, by union rule, when requests for distribution are allowable, subject to standard of section 401(c).

[6] Judge Hall noted in his dissent from the Fourth Circuit majority decision that this regulation supported petitioner's interpretation. (Joint Appendix 88).

far as they have "power to persuade," the interpretation is not binding here. *Skidmore v. Swift*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944). See generally 2 Davis, *Administrative Law Treatise* § 7:10 2d ed. 1979). The "deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97, 104 S.Ct. 439, 78 L.Ed. 195 (1983).

Because the courts are the final authorities on issues of statutory construction, an agency construction which is inconsistent with the statutory mandate or frustrates the underlying congressional policy must be rejected. *Federal Election Comm. v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32, 102 S.Ct. 38, 70 L.Ed.2d 23 (1981); *Securities and Exchange Comm. v. Sloan*, 436 U.S. 103, 117-8, 98 S.Ct. 1702, 56 L.Ed.2d 148 (1978).

D. The Facts of This Case Exemplify How the Lower Court's Interpretation Defeats the Statutory Purpose of the LMRDA

As petitioner has shown above, the legislative history, regulations and judicial precedent all indicate that the reasonableness of a request must be determined in light of union rules. An examination of this union's election procedure and the way in which Brown's request conflicts with that procedure reaffirms the appropriateness of this approach.[7]

[7] One of the issues argued by petitioner below was that the District Court erred in failing to consider any factual evidence in determining whether petitioner complied with section 401(c). Although this issue is not squarely before this Court, examination of petitioner's election procedure exemplifies the importance of allowing unions to govern their internal affairs.

The procedure that governs the distribution of campaign literature is set forth in the Masters, Mates & Pilots constitution. (Joint Appendix 16). The constitution was adopted by a majority vote of the union membership after receiving a two-thirds majority pro rata vote of convention delegates. (Joint Appendix 16). Thus, disregard of the union's rule does not simply strike down a rule adopted by incumbent union officers for their benefit, but it also frustrates the will of the entire union. Because of its longstanding and consistent application, all candidates were aware of this procedure in advance, fostering equal treatment of all candidates.

This procedure is an integral part of the nomination and election process, whose contours define the reasons for the existence of various rules. The constitutional structure of the union dictates that the election shall be administered by a committee of rank and file members elected by the delegates, and not just by the incumbent officers. (Joint Appendix 36). The convention delegates select the independent balloting agency and independent mailing service, who fulfill the necessary election functions, thus removing the electoral procedures from the taint of control by the incumbents. (Joint Appendix 26-36). Campaign mailings are not authorized until the majority chooses an appropriate independent agency and the nominees are certified in order to protect the campaign's integrity and restrict the use of the mailing procedure to actual, eligible candidates. (Joint Appendix 60).

These procedures show that the union through majority vote, has created a reasoned and coherent procedure for election of its officers. Unlike the interpretation advocated by respondents and the Fourth Circuit, this election mechanism should be disregarded entirely in assessing whether a request to distribute campaign materials is reasonable under the dictates of section 401(c). The effect of such a ruling would not simply exorcise a single

provision but would tear at the entire fabric of the union constitution.

For example, the rationale would preclude the union from enforcing its eligibility requirements. This Court has found that a union is clearly entitled to enforce all reasonable qualification requirements.[8] *Brock v. International Organization of Masters, Mates & Pilots*, 842 F.2d 70 (4th Cir. 1988). It therefore should be able to restrict literature distribution only to those individuals who have satisfied the eligibility scrutiny.

This exemplifies how if the union's rule is disregarded, there may be no guidelines to determine whether a request is reasonable. Any member who professes that he is a bona fide candidate and that he needs to campaign, would claim a reasonable basis for making a request at any time during the four year period between elections.

The results of such a policy would have an unnecessarily burdensome effect on the union. The union officers would be required to continuously assess requests, taking time from their other important responsibilities. The General Executive Board would have to assemble from around the country to adjudge requests, at great expense to the union. The union officers would have to negotiate independently with each "candidate" to select an agreeable mailing service and to define conditions for its use. These decisions would be effectively removed from control of the union majority, where they properly belong.

---

[8] Under the union constitution, Brown was not a candidate at the time he made his request, as the convention had not taken place and he had not complied with the certification requirements. (Joint Appendix 26-31). In the appeal before the Fourth Circuit, respondent relied upon cases such as *Yablonski v. Mine Workers*, 80 L.R.R.M. 2594 (D.D.C. 1971) to establish that a person may be a candidate for purposes of literature distribution before he has been nominated. That case, however, involved a procedure where nomination required petitions from 50 locals. As Brown could nominate himself, this case furnishes no support for the argument that Brown was a candidate in this context.

Although this might seem to be a minor burden for the sake of union democracy, it should be noted that this duty is not limited to candidates for International President. Candidates for the vice presidencies and all delegate positions will also want to exercise their rights under expanded section 401(c). Naturally, those candidates with more resources will be better able to make repeated mailings for the four year period.

As Judge Hall observed in his dissent, "In this case there has been no finding or even persuasive suggestion that IOMMP's election procedures limiting candidate mailings until after the formal nomination process is unfair, discriminatory, or provides any undue advantage to incumbents." (Join Appendix 86).

Despite this statutory conflict, the majority of the Fourth Circuit concluded that the union's entire election procedure is to be disregarded because a theoretical advantage to an "insurgent" may be found by judges. It is this interpretation that stands the statute on its head.

Reduced to its simplest form, respondent's position requires that *all* requests to distribute literature must be granted. Respondent has never articulated a line that may be drawn or a way to determine how a line may be drawn. Obviously, adherence to a rule that has not been shown to be unfair, arbitrary or discriminatory provides that measurement of "reasonable requests" called for by the statute.

E. Because Brown's Request Did Not Comply With the Union's Reasonable Rule, It Should Not Have Been Granted

The District Court also rested its decision on a secondary ground—that even if the statute required examination of the union's election procedures, the union's rule was unreasonable. The status of this holding is not certain. It was not considered by the Fourth Circuit in light of its decision, although respondent sought this conclusion as an alternative basis for its ruling. In any

event, reliance upon this rationale would be unsound because the district court's holding was a factual finding that was made after refusing to permit the union to produce evidence.

Although the primary holding involved only construction of the language of section 401(c), once the court moved on to the alternative holding that the union's rule was unreasonable, it placed itself in the position of adjudicating facts. In that position, it should not have adjudicated facts without permitting petitioner the opportunity to present evidence. To the extent that it precluded evidence, the court's holding should not be upheld based upon a factual finding.

As pointed out above, a construction of the statute that focuses only upon the reasonableness of the candidate's request ...cessarily places the court in the position of *ad hoc* judicial decision making. A finding that the union's rule is unreasonable, without permitting the union to bring forth eveidence about the reason for the rule, the mechanics of the union's procedure and the way its elections are conducted greatly exacerbates the problem. Furthermore, the factual assumptions that have been made by the courts below [9] illustrate that knowledge of the facts is unavoidable. If the case is to be decided on facts, then denial of an opportunity to present those facts is fundamentally unfair.

The reasonableness of the union's rule is shown by the reasons for its existence. Because all candidates are notified at the same time, all have an equal opportunity to make mailings. The identity of nominated candidates cer-

[9] For example, the Fourth Circuit assumed that all incumbents, including the IOMMP's officers, abuse union channels of communication between elections to promote their candidacy. (Joint Appendix 83). It is not appropriate to make this unproven possibility the sole basis for construing the statute as the Fourth Circuit has. Where such abuse has been proven, the LMRDA provides remedies and the courts have not hesitated to enforce them.

tified as eligible permits a determination of who is entitled to make mailings. The independent mailing service has been selected. The rule is an organic rule, fashioned by the dictates of the union's election procedure, not an arbitrary rule without relations to them.

Moreover, the rule permits all candidates to have mailings in the hands of members at or before the time the ballots are mailed. In light of the fact that candidates may make repeated mailings throughout the ninety day ballot period, this point is not of unique importance. But to the extent that a candidate views it as important to have his literature in the hands of members before they receive ballots he has that ability under the IOMMP procedure.

The basis of the District Court's conclusion that the rule was unreasonable was its theory that any rule that limited a nonincumbent candidate's [10] right to make mailings to the post convention period was unreasonable. That theory, however, ignores the fact that the rule is an inextricable part of the election procedure. It links that date for distribution to the time when the machinery for the conduct of the election is put in place; that link is natural because the mechanics necessary for all certified candidates to have an equal opportunity to distribute literature are created. Any rule that was not linked to the election procedure would be arbitrary, no matter how liberal in its allowance of mailings. In essence, the district court's conclusion does not simply hold the union's rule unreasonable; it outlaws the Organization's entire election procedure.

The reasonableness of the union's rule is shown by the reasons for its existence. First, because all candidates are notified at the same time, all have an equal oppor-

[10] Brown has been referred to as an insurgent because he is not an incumbent. To the extent that this usage implies that he is not a candidate known to the IOMM&P membership, it ignores his years of campaigning for office.

tunity. Second, the International Balloting Committee knows who has been nominated and who meets the candidacy requirements. Third, the independent mail service has been selected. It is an organic rule, fashioned by the dictates of the union' election procedure, not an arbitrary rule without relation to them.

We ask that this Court reverse the decision below and find that respondent's request to distribute literature not in conformance with the union's rule was not reasonable within the meaning of section 401(c). In the event the Court determines that the factual record below is not sufficient to compel a reversal, we ask that the case be remanded to the District Court for a full evidentiary hearing to reconsider its conclusion that the rule was unreasonable in the light of facts in evidence rather than assumptions.

CONCLUSION

For the reasons stated, it is respectfully prayed that the District Court and Court of Appeals decisions be reversed, and that this Court find that Petitioner's denial of a noncomplying request to distribute literature was reasonable under 28 U.S.C. § 481(c). Alternatively, it is respectfully prayed that the Fourth Circuit decisions be reversed, and that this case be remanded for proceedings to present evidence on the issue of whether the rule is reasonable.

Respectfully submitted,

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QUESTION PRESENTED

Did the court of appeals correctly affirm the rulings of the district court, which held that petitioners had violated respondent's rights under section 401(c) of the Labor-Management Reporting and Disclosure Act because his request to mail campaign literature to his fellow union members was reasonable and because petitioners' practice of refusing to honor requests such as respondent's was unreasonable?

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TABLE OF AUTHORITIES

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Bauman v. Presser,
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Brock v. Hotel Employees Local 471,
706 F. Supp. 175, 182 (N.D.N.Y. 1989) 35

Camarata v. Teamsters,
478 F. Supp. 321 (D.D.C. 1979),
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Chan v. Korean Air Lines,
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Chevron USA v. NRDC,
467 U.S. 837 (1984) 17

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DelCostello v. Teamsters,
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English v. Cunningham,
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Irwin v. Possehl,
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Hall v. Cole,
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Hayes v. IOMMP,
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Hodgson v. ILA Local 1418,
76 L.R.R.M. 2556 (E.D. La. 1971) 31

Marshall v. Meat Cutters Local 274,
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Marshall v. Plumbers Local 654,
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Marshall v. Teamsters Local 468,
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Marshall v. Watchman's Local 2,
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Morrissey v. Curran,
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Petrazullo v. Lowen,
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Sheldon v. O'Callaghan,
497 F.2d 1276 (2d Cir. 1974) 33

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Steelworkers Local 3489 v. Usery,
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Steelworkers v. Sadlowski,
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Usery v. IOMMP,
422 F. Supp. 1221 (S.D.N.Y. 1976),
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Wirtz v. AGVA,
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Wirtz v. Glass Bottle Blowers Local 153,
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Wirtz v. Hotel Employees Local 6,
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STATUTES, REGULATIONS, LEGISLATIVE HISTORY

Labor-Management Reporting and Disclosure Act of 1959,
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Title IV, 29 U.S.C. §§ 481 *et seq.* 15, 16, 29, 31
Section 401(c), 29 U.S.C. § 481(c) .....*passim*
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29 C.F.R. § 452.25 23

29 C.F.R. § 452.37 39

29 C.F.R. § 452.41 39

29 C.F.R. § 452.67 .....25, 26, 28

29 C.F.R. § 452.69 36

29 C.F.R. § 452.80 35

NLRB, *Legislative History of the LMRDA* (1959) .....*passim*

MISCELLANEOUS

Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*,
73 Harv. L. Rev. 851 (1960) 15

Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*,
58 Mich. L. Rev. 819 (1960) 15, 16

Goldberg, *Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement*,
1989 Duke L.J. 903 (1990) 16

Hartley, *The Framework of Democracy in Union Government*, 32 Cath. L.
Rev. 13 (1982) 13, 14, 29, 30

Jacobs & Spring, *Fair Coverage in Internal Union Periodicals*, 4 Indus. Rel.
L.J. 204 (1981) 14

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James, *Union Democracy and the LMRDA*,
13 Harv. C.R.-C.L. L. Rev. 247 (1978) 24, 30

Levy, *Electing Union Officers Under the LMRDA*,
5 Cardozo L. Rev. 737 (1985).....37

Levy, *Legal Responses to Rank and File Dissent*,
30 Buff. L. Rev. 663 (1981) 15

Lipset, Trow & Coleman, *Union Democracy* (1956) 23

Quaglieri, *The New People of Power: The Backgrounds and Careers of Top Labor Leaders*,
9 J. Lab. Research 272 (1988) 22

Summers, *Democracy in a One-Party State: Perspectives from Landrum-Griffin*,
43 Md. L. Rev. 93 (1984) 14

Summers, *Judicial Regulation of Unions Elections*,
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Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 Yale L.J. 176 (1960) 32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1330

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, ROBERT J. LOWEN, and F. ELWOOD KYSER,

Petitioners,

v.

TIMOTHY A. BROWN,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR RESPONDENT

STATEMENT

A. Facts.

Petitioner International Organization of Masters, Mates and Pilots ("IOMMP") is a national union, most of whose 8000 members work as ship's officers, as pilots, and in similar positions. Almost all members spend their working lives on board ship, and are often away from home for long periods of time. As a result, it is very difficult for members to communicate with each other about political issues facing the union without using the mails. Joint Appendix at 13 ("JA 13"). This is often true in unions, but, as courts have recognized in other cases, it is particularly true in maritime unions

because of the small number of workers on each vessel and the lengthy periods during which members are essentially incommunicado while at sea. And, as is true in most unions, the only complete membership mailing list is in the hands of the union. JA 80.

When this case arose in the summer of 1988, the union was about to conduct its quadrennial election of officers. Under the union procedure, which is set forth in Article V of the IOMMP Constitution, JA 25-40, nominations were to be made at the union convention from August 22 to 24, and the ballots were to be mailed out at some time between ten and thirty days after the convention ended. JA 38. Recognizing that the nature of its members' work prevents them from coming home to collect their mail for weeks or even months, the union allows a lengthy period of time — ninety days — between the mailing of the ballots and the deadline for their return. JA 14, 38. Regardless of when they actually see their ballots, most members return them shortly thereafter. JA 14, 50.

The procedure followed by the union for conducting mailings is set forth in an affidavit supplied by petitioner Robert Lowen, the president of the IOMMP. JA 60-61. A list of certified candidates is developed within the first ten days after the convention ends. At that time, an "Impartial Balloting Agency," which is selected at the convention, sends a notice to the candidates, telling them the procedures to follow in order to have their literature mailed. In the 1984 election, for example, this notice was dated August 15, JA 62, only twelve days before the ballots were mailed on August 27. JA 57. After that notice is received, the candidates may communicate with the mailing service, which prepares the literature for mailing and then sends it out. Union counsel refused to make any representation below about how far into the period between the convention and the ballot mailings candidates would actually be able to have their literature mailed, except to state, "I would anticipate that he could get his literature out in the mail *some period of time* before the ballots go out." JA 69 (emphasis added).

Respondent Timothy Brown was a candidate for the position of union president in the 1988 election. He wanted to send a mailing

to the membership in the month before the convention, rather than after the convention and just before the ballots were mailed out, because he wanted the membership to begin considering his candidacy, and the issues he hoped to raise in his campaign, before the deadline for making nominations. In addition, he hoped to attract support from other members who shared his dissatisfaction with the current course of the union, but who, in the absence of a known alternative, might be inclined to run for office themselves or commit themselves to support the candidacy of others. JA 14.

The officers of the union, however, were not anxious to facilitate Brown's opposition. They enjoy a monopoly over the official channels of communication within the union, primarily a union newspaper whose editorial board consists solely of the incumbent officers. IOMMP Constitution, Article XI, Section 5. By monopolizing this medium, the officers are able to generate a steady stream of articles promoting their own views concerning the problems facing the union, while refusing to print the articles of the intra-union opposition; in effect, this process permits the incumbents to set the agenda for all debates with the union. JA 13-14.

On May 9, 1988, respondent notified petitioner Elwood Kyser, the union's secretary-treasurer, that he wished to send a mailing to the union membership, at his own expense, in support of his candidacy, and he requested information on the costs involved. JA 15, 41. After waiting in vain for almost a month for a reply, respondent repeated his request to petitioner Lowen, specifying that he wanted to send out his mailing by July 5, 1988. JA 15, 42-43. On June 7, petitioner Kyser finally responded by denying respondent's request, on the ground that no mailings would be permitted until after the IOMMP convention had ended and an "impartial" agency had been selected to supervise the balloting itself. JA 15, 44-45.

On June 15, respondent promptly appealed this decision to the IOMMP General Executive Board ("GEB"), which is the highest governing authority in the union between conventions. In his appeal, respondent specified that he wanted to send out his mailing by July 5, and that he wanted a mailing service to be provided with

"Cheshire" labels, which are the kind of computerized mailing labels that can be affixed by machine. JA 15, 46. When no response was received to this appeal, respondent's counsel called petitioners' counsel to indicate that immediate legal action was contemplated in order to ensure that respondent's July 5 deadline was met. On June 27, 1988, petitioners' counsel responded that the matter was on the GEB's agenda for July 6, 1988, JA 47, and, on that date, the GEB denied respondent's request. JA 48.

After the preliminary injunction was entered in this case, petitioners conducted their election, in which respondent and petitioner Lowen were the only candidates for president. Having failed to prevent Brown's mailing, the incumbents ensured their election by stuffing the ballot box. Thus, although Lowen defeated Brown by 110 votes out of 4500 cast, the Secretary of Labor sued to overturn the election on several grounds, including extensive ballot fraud by petitioners. On August 31, 1990, the United States District Court for the District of Maryland found several violations of the law, including that the incumbents had refused to send ballots by mail to a large group of members as the union constitution requires, but instead had given them to a union employee, and that, as a consequence, numerous ballots were cast fraudulently by unidentified persons. The court found that, absent this ballot fraud and other violations, respondent would have won the election, and it ordered that a new election be held under the Secretary's supervision. That election will be completed at some time next year.[1]

B. Proceedings Below.

On July 11, 1988, respondent filed his complaint in the United States District Court for the District of Maryland, alleging a violation of section 401(c) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 481(c), and petitioners' counsel received a set of papers the next day. On July 15,

[1]Copies of the official transcript of the district court's oral opinion have been lodged with the Clerk.

1988, Richard Hunsucker, head of the Division of Elections in the Department of Labor, which had been furnished with copies of respondent's requests and of petitioners' replies, wrote to both sides explaining that petitioners' position was contrary to the requirements of the LMRDA. Mr. Hunsucker warned that, if the union refused to honor respondent's request, it would be in violation of the Act, and that the Secretary of Labor would consider suing to overturn the election. JA 52-54.

A hearing was scheduled on respondent's motions for a temporary restraining order and preliminary injunction on July 25, 1988. At the hearing, petitioners urged the court to decide the case on the basis of the undisputed facts in the affidavits submitted by both sides, unless the record showed "factual conflicts" on which the union reserved the right to present evidence. JA 65. Respondent argued that his request to have his literature mailed to the union membership only eight weeks before the latest date when the ballots could be mailed, and only one month before the convention at which nominations would be made, was entirely reasonable. Petitioners did not argue that respondent's request was unreasonable, and indeed throughout this litigation they have never denied that it was reasonable for respondent to want to mail his campaign literature to the membership before the union's convention. Rather, their sole contention has been that the request should be denied because it is inconsistent with their rule concerning campaign mailings, a rule which they consider to be reasonable. Thus, petitioners argued that they should be permitted to require compliance with their past practice forbidding mailings until the candidates had been nominated and the list of nominees officially certified as eligible, although petitioners conceded in argument that respondent was, in fact, eligible to run for office. Somewhat incongruously, petitioners also argued that the Secretary, who had already threatened to overturn the election if Brown's request were denied, would sue to overturn it if the request were granted.

Respondent, for his part, argued that the union's practice was contrary to law, because the Secretary's regulations specify that

a candidate is entitled to have mailings done as soon as he declares his candidacy, whether or not nominations have yet occurred, and that, in any event, the focus under the statute should be on the reasonableness of respondent's request, not the reasonableness of petitioners' rules. Respondent further pointed out that this same construction of the statute had been adopted by the Secretary, and argued that the court should defer to the Secretary's judgment in that regard. Finally, respondent argued that the IOMMP Constitution did not in fact bar mailings before the convention, but rather did not speak to that issue, and that, even if no "impartial" agency had yet been selected for the 1988 election, such an outside agency was not necessary to generate the labels and send out the mailing.

District Judge J. Frederick Motz granted the preliminary injunction, relying on two alternate grounds. First, he accepted the view of the Secretary and ruled that, because the statute was framed in terms of "reasonable requests," the question was not whether petitioners had adopted reasonable rules, but whether respondent had made a reasonable request. Although acknowledging that unions may be encouraged to adopt rules, so that all candidates will know the procedures in advance, "in evaluating the validity of the rule a court must inquire not simply whether the rule may be said to be 'reasonable' but whether its application results in the rejection of a reasonable request made by a candidate." JA 77.[2] Because respondent's request was plainly reasonable, petitioners had violated the Act. *Id.*

In the alternative, Judge Motz held that the union's rule was unreasonable. First, he concluded that any rule that forbids all pre-

[2]In the court of appeals, petitioners carped at the district judge for referring to the delegates as representatives of their local unions, JA 77, suggesting that the "error" showed the need for a full trial. In fact, the delegates are representatives of the union's seven "membership groups" whose base is craft as well as geography. JA 18, 63. The district court had originally used the term "locals" in questioning petitioners' counsel, and counsel did not then object to the use of the term. JA 67. *See also Usery v. IOMMP*, 550 F.2d 826, 827 (2d Cir. 1977) (describing membership groups as "locals").

convention distributions is per se unreasonable, because a candidate has a valid interest in getting his literature into the hands of members and delegates to the convention in time to encourage discussion and consideration of his candidacy before the delegates assemble. JA 77. Second, although the union allows a lengthy time for members to return their ballots, Judge Motz noted that it was undisputed that members of the union work for long periods of time away from their homes. JA 78. Thus, even if a candidate could be confident that his literature would reach the homes of the voters, and be read by them, before they cast their ballots, candidates also have a right to give members the opportunity to receive their campaign messages in time to discuss the issues with each other before casting their ballots, which would be impossible if mailings were permitted only during the period of less than a month before the ballots are mailed. *Id.*

Judge Motz also found that the balance of hardships weighed in respondent's favor, JA 72, and accordingly the Court ordered petitioners to mail respondent's literature, at his own expense. This order was stayed pending a hearing before a panel of the United States Court of Appeals for the Fourth Circuit, and the case was argued before that panel on July 28, 1988 — three days after the preliminary injunction was granted. The panel affirmed the decision by a brief order, and explained its ruling a month later. The majority opinion, written by Judge Donald Russell and joined by Judge H. Emory Widener, agreed with the district court that the plain words of the statute, supported by the construction put on the statute by the Secretary, commanded unions to comply with any reasonable request and that reasonableness should be determined by reference to the statutory objective of ensuring free and democratic elections. JA 81-82. Moreover, the court observed, Congress recognized the fact of life that union incumbents have inherent advantages in elections, and section 401(c)'s right to have mailings done by the union was an effort to counteract that advantage. Specifically, given the incumbents' control of the membership list, their continuing contact with the union membership and lower-level officers, and their ability to use the union newspaper to communicate their own views

to the membership, an insurgent candidate obviously needs to be able to get his message out early and often in order to have a chance of success. JA 82-83. Thus, "the manifest result" of a rule that allows mailings only in the short period of time between nominations and balloting, "whether intended or not, . . . is to delay the insurgent candidate in beginning his campaign and to reduce the time within which he can make his appeal to the voters." JA 83.

The court then turned to petitioners' attempt to justify their rule as being a reasonable method to prevent discrimination in the use of mailing lists. It found this defense to be meritless, because any candidate could have made the same request as respondent and would have been equally entitled to have it granted. Rather, the granting of respondent's request would simply reduce the effective discrimination created by the incumbents' control of the channels of communication within the union. JA 84. Furthermore, the court held, the question was not the reasonableness of the union's rule; rather, the issue was the reasonableness of the member's request, JA 84, and petitioners had not denied that respondent's request was reasonable. JA 83.

A dissenting opinion was filed by Judge Kenneth K. Hall, who stated that the reasonableness of a particular request can only be ascertained by reference to the particular factual circumstances in which it was made, and that such a request necessarily threatens the union's ability to govern itself. JA 87. Moreover, Judge Hall deemed petitioners' rules to be proper, and he expressed the fear that, in the absence of "fair uniform rules" that all candidates had to follow, there might be "an appearance of disparate treatment." *Id.* Finally, Judge Hall acknowledged that courts should defer to the Secretary's construction of the statute, but he concluded that that rule was inapplicable here because the Secretary's position was "contrary to reasonable statutory interpretation" and "arguably in conflict with his own regulations," as Judge Hall construed them. JA 88 n.2.

The court of appeals then granted petitioners' request for rehearing *en banc*, and the Secretary entered the case to argue as *amicus*

curiae in support of respondent. Eight judges ultimately adopted the panel opinion as their own. JA 90. Judge James Dickson Phillips joined Judge Hall's dissent and added a brief statement agreeing that any request that does not comply with a union's "general rule" is unreasonable unless that rule is "unfair or arbitrary in its general application." *Id.*

SUMMARY OF ARGUMENT

The language of the statute — unions must comply with "all reasonable requests" from "any candidate" — supports the lower courts' decision to focus on whether a particular request from a particular candidate is reasonable, rather than whether a union has adopted a rule that would defeat the request, and whether that rule is reasonable. Of particular significance is the fact that, in other parts of the statute, Congress expressly made rights subject to reasonable union rules. Indeed, the relevant statutory language is sufficiently clear that there is no need to resort to the legislative history and other interpretive aids to demonstrate that the construction of the statute advocated by the Secretary and endorsed by the lower courts is correct.

If the Court finds it necessary to consider more than the language of the statute, the legislative history establishes that Congress considered the right to do campaign mailings to be absolutely essential if an insurgent were to have a realistic chance of turning an incumbent out of office. Thus, a construction of the statute that facilitates campaign mailings is preferable to one that would have the courts defer to incumbent-sponsored rules, whose principal impact, if not the purpose of which, is to impede insurgent campaigning.

Nor is the question of focusing on the reasonableness of the request, rather than the reasonableness of the union's rule, an exercise in question-begging. It is true that, in the end, a court will have to decide the question of reasonableness, and in making that decision it will have to weigh the same combination of factors including the interests of the union as an institution and the interests of the

candidate, in light of the Congressional objective of union democracy. But there are two ways in which the difference between these two approaches is significant.

First, the way in which the question is stated goes a long way toward answering the question of on whose shoulders the court should place the burden of justifying the making or the denial of the request, and to whose judgment the courts should defer in deciding the question of reasonableness. If the issue is the reasonableness of the request, it is the candidate who is entitled to choose among alternatives, while the union must show that the candidate's position is unreasonable, and the courts will require the union to honor the request so long as the member has acted within the range of reasonableness. By contrast, if unions are entitled to adopt reasonable rules limiting the right to do campaign mailings, then in reviewing a dispute between the union and the candidate, the burden is likely to fall on the candidate to prove the union's rule unreasonable, and the courts will defer, to a greater or lesser degree, to the union's judgment about the balancing of interests.

Second, the number of "reasonable requests" that will be honored will be different under the two approaches. Thus, a rule is presumably reasonable so long as, in most instances, it would meet the legitimate interests of candidates without unduly harming the institutional interests of unions. The implication is that there is some range of permissible rules, some of which allow more mailings or make them easier, and some of which allow fewer mailings or make them more difficult to accomplish, and that the union's decision to impose limitations will be upheld so long as its rule falls within the range of reasonableness. The fact that there may be some small number of candidates whose legitimate interests would be ill served by the rule, or that a better rule could be devised without great difficulty, would not be a ground for insisting that the candidate's request be honored. On the other hand, if the law requires compliance with any reasonable request, a request that is contrary to a rule that would allow most reasonable requests would still have to be honored if the request itself were reasonable.

In effect, then, respondent's focus on the reasonableness of the request is likely to result in the allowance of more campaign mailings, and to better protect the interest of challengers in elections, while petitioners' focus on the reasonableness of the rule — assuming that most election rules tend to favor incumbents because of the manner in which they are written and applied — is likely to make it harder for insurgents to exercise this right. Moreover, if disputes arise, it will be far easier for the parties and the court to focus on the reasonableness of the request rather than the operation of an entire rule, especially in the context of preliminary injunction proceedings (which are the only way to resolve controversies that arise in the course of an ongoing election), because the litigation can focus on the single request rather than on the possible inequities of the union's entire system.

Moreover, incumbents have no incentive to adopt rules that facilitate challenges to their positions or to allow mailings unless the requests are clearly reasonable. An insurgent candidate, however, has every incentive to limit mailings to those which are truly needed for a successful candidacy, because the candidate has to pay the expenses of the mailing, and few insurgents find themselves with a surplus of campaign funds. In short, no legitimate union interest requires adoption of the "reasonable rules" approach, but the strong interest in ensuring that union officers are held accountable to their constituents strongly counsels in favor of making the right to do a mailing turn on whether the request is reasonable, not on whether the union rule barring the mailing is reasonable. This does not mean that a court could be justified in ignoring a union rule, and the lower courts did not do so; it only means that the existence of a union rule does not end the case.

Even if the Court concludes that a request is valid only if it complies with a reasonable union rule, the judgment should be affirmed because respondent's request did not violate any reasonable union rule. Not only does the IOMMP Constitution not contain the rule that petitioners now assert as a justification for denying his request, but such a rule is plainly unreasonable because it unduly limits the

right of an insurgent candidate to campaign for union office to the few days before the vote is held. Nor have petitioners advanced any legitimate union interest that justifies the severe impact that the rule that has on the interests of a candidate who challenges an incumbent union officer.

ARGUMENT

A. Introduction and Statutory Background.

Because this case presents an issue of statutory construction, we begin with the words of the statute. Section 401(c) of the LMRDA provides that unions and their officers

> shall be under a duty, enforceable at the suit of any bona fide candidate . . . to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization . . ..

This language was added to the LMRDA on the floor of the Senate, supported by both organized labor and those who were pressing for rigorous standards of union democracy. They all agreed that this is one of the minimum standards with which all unions would have to comply in order to promote union democracy. II NLRB, *Legislative History of the LMRDA* 1240-1242 (1959) (*"Legis. Hist."*). The bill also forbids discrimination in the use of lists, but the affirmative duty was deliberately added in an effort to achieve maximum support on the floor. *Id.* at 1240.

As Senator McClellan explained, an incumbent officer, by the very nature of his position and the daily work he does for the union, can perpetuate himself in office because he

> would know how to line up his forces, and so forth; but a candidate who was not in office would not have a [complete membership] list and would not have all that information. This amendment would simply permit him to send

> his campaign material to the union and have the union mail it out.

Id. at 1240.

Organized labor had expressed concern that, if the mailing list were given to the candidates themselves, it might get into the wrong hands, and the solution was to give unions the affirmative duty to do mailings for the candidates. According to the sponsors of the substitute amendment, this right would be available to any "serious" candidate or any "legitimate" candidate for union office. *Id.* at 1240, 1241.

One concern that was expressed during the debates was that unions might not comply with the requests, and that courts might not have time to deal with the litigation before the election had taken place, thus permitting the incumbent officers to protect their positions and then to spend the union's money to defend their actions. *Id.* at 1241. Indeed, one proposal was to impose criminal sanctions to ensure compliance. Senator Javits, however, who played a key role in forging the compromises in the union democracy provisions generally and who wrote the language for section 401(c), reassured his colleagues that he believed that "a court will act, and act in time." *Id.*

This legislative history makes it clear that, at the very least, section 401(c) was intended to aid insurgents in their efforts to challenge incumbents, and it should thus be construed to advance that objective. But in addition to the specific legislative history concerning section 401(c), the Court's interpretation of the LMRDA should be informed by a general understanding of conditions in the labor movement, of which Congress was acutely aware. Thus, commentators on problems of union government uniformly recognize that incumbents, by repeatedly communicating their own views of the problems facing the union and their proposals for solving such problems to the union membership, have the opportunity to set the agenda for discussion of union affairs in a way that favors their own programs and their own reelection. Hartley, *The Framework of*

Democracy in Union Government, 32 Cath. L. Rev. 13, 78-79 (1982); Jacobs & Spring, *Fair Coverage in Internal Union Periodicals*, 4 Indus. Rel. L.J. 204, 206-215 (1981). Insurgent candidates need the opportunity to communicate with each voter on more than one occasion if they are to have any hope of overcoming incumbents' advantages in this regard. *See generally* Summers, *Democracy in a One-Party State: Perspectives from Landrum-Griffin*, 43 Md. L. Rev. 93 (1984) (''*One-Party State*''). Professor Summers points out in *One-Party State* that, in order to achieve Congress' objective of fostering democratic control of unions, the courts must not be blind to the political realities in which union democracy must function. *Id.* at 118. Thus, he suggests,

> the law cannot be paralyzed by nominal neutrality between the incumbents in control and the opponents who challenge their control. The function of the law must be to loosen the grip of oligarchy so that those opposed to the incumbents can make their voices heard and the weight of their opposition felt.
>
> *Id.* at 99.[3]

In their brief, petitioners criticize the reliance of the court below on such considerations in construing section 401(c). According to petitioners, Petitioners' Brief (''Pet. Br.'') 26 and n.9, the Fourth Circuit improperly assumed, without any factual support, that petitioners had abused their control of the union channels of communication between elections. This criticism is erroneous, because incumbents' control of the channels of communication is not a ''factual'' matter that can or should be subject to proofs at a trial every time a section 401(c) motion for preliminary injunction has to be litigated. Rather, as the legislative history shows, these are the

[3]Professor Summers was a member of the special committee formed by Senator John F. Kennedy, the Chairman of the Senate Labor Committee, and chaired by Archibald Cox, that advised the Senate Committee in drafting the legislation. He was the author of a ''Bill of Rights for Union Members'' that became the basis for Senator McClellan's floor amendments. His pioneering scholarship was cited in the debates on the floor. *E.g.*, II *Legis. Hist.* 1113.

very conditions in the labor movement that animated Congress' decision to create an absolute right to do membership mailings without a showing of discrimination.[4]

Both petitioners and their *amicus* place great reliance on a fragment from the Court's decision in *Steelworkers v. Sadlowski*, 457 U.S. 102, 117 (1982), which in turn cited reports of the Senate Labor Committee, to the effect that the proposed legislation was intended to minimize intrusion into union self-government. Pet. Br. 15-16, AFL-CIO Br. 17-18. They invoke that language in support of their contention that the statute should be construed to leave in place any union rules that are not explicitly invalidated by Title IV.

It is true that such language appeared in the Senate Committee reports in both 1958 and 1959, but what the unions ignore is the reason why the language was placed in the reports — to explain why the committee had decided not to include a Union Members' Bill of Rights and other specific union democracy protections in the bill, and to rely instead on a policy of encouraging unions to adopt Ethical Practices Codes and police them internally. *See* Levy, *Legal Responses to Rank and File Dissent*, 30 Buff. L. Rev. 663, 684 n.118 (1981); Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851, 857 (1960); Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich.

[4]In any event, undisputed facts in the record show that the matters about which Congress was concerned when it enacted section 401(c) were present here. Respondent's undisputed affidavit establishes that the union's newspaper is ''the principal and only regular source of information members have about union affairs,'' that the editors of the newspaper are the incumbent officers of the union, that the editors screen out membership submissions that are ''political,'' that the editors use the newspaper to promote their own views of the union's problems, and that consequently ''members are subject to [a] steady barrage of information favoring the policies espoused by the incumbents.'' JA 13-14. Because petitioners asked to be allowed to submit evidence only to resolve conflicts in the record, JA 65, and never asked to be allowed to present evidence on this issue, they can scarcely take the courts below to task for not deciding, *sua sponte*, to hold a trial on this issue.

L. Rev. 819, 831 (1960). The House Committee's report, by contrast, which was written after Title I and section 401(c) had been inserted on the Senate floor, and which accompanied a bill containing similar provisions, does not include comparable language solicitous of minimizing intervention. I *Legis. Hist.* 759-833. The addition of Title I and of section 401(c) of the Act on the Senate floor amount to a repudiation of the philosophy expressed by the cited language in the Senate Committee's reports, *see* Cox, *Internal Affairs*, *supra*, 58 Mich. L. Rev. at 845 (1960) (as enacted, the provisions of Title IV "descend too far into detail, impairing the ideal of self-government"), and therefore it cannot be used as a guide to interpreting those portions of the statute, such as section 401(c), that were added after the committee reports were written.

Moreover, we urge the Court not to lend credence to the notion that the minimum protections for union democracy that Congress decided to include in the statute should be given the most crabbed possible interpretation in order "to promote union self-government interests." AFL-CIO Br. 18. To the contrary, the idea of empowering members to mount realistic challenges to entrenched union leaders "so that they may . . . bring about a regeneration of union leadership" lay at the heart of Congress' strategy for returning unions to *genuine* self-governance and stamping out corruption by ensuring that leaders would be accountable to their constituents. *E.g.*, II *Legis. Hist.* 1099 (Sen. McClellan); I *Legis. Hist.* 767; Goldberg, *Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement*, 1989 Duke L.J. 903, 935 (1990). Emphasis on the non-intervention philosophy overlooks the fact that Congress was "committed to making that intervention, once warranted, effective in carrying out the basic aim of Title IV." *Wirtz v. Glass Bottle Blowers Local 153*, 389 U.S. 463, 473 (1968).

In the lower courts, petitioners never argued that respondent's request to have his literature mailed was unreasonable. Instead, relying on a pair of cases from the Third and Ninth Circuits,[5]

[5] *Donovan v. Philadelphia Metropolitan Council of Carpenters*, 797 F.2d 140 (3d Cir. 1986); *Marshall v. Meat Cutters Local 274*, 623 F.2d 1322 (9th Cir. 1980).

they argued that respondent was required to comply with the union's past practice with respect to mailing of campaign literature because the practice was itself reasonable. Accordingly, any request that did not comply with the union's procedure would be *per se* unreasonable.

In the following pages, we argue first that petitioners have chosen the wrong focus for their argument, and that the Secretary of Labor and the courts below are correct in focusing their attention on whether respondent's request was reasonable. We also explain why the difference between "reasonable rule" and "reasonable request" is not mere semantics. Second, we argue that the preliminary injunction was properly affirmed even if the focus is whether the union had a reasonable rule.

B. The Focus of Section 401(c) Is on the Reasonableness of the Request, Not on the Rule on Which the Incumbent Officers Relied in Rejecting It.

1. The Language and Purposes of Section 401(c) Support a Focus on the Reasonableness of the Member's Request, Which Permits the Individual Candidate the Opportunity to Do Campaign Mailings at Any Point Within the Range of Reasonableness.

There is no question that the Secretary has construed the statutory language — "reasonable requests" — to provide that the relevant determination should be made by focusing on whether the request itself is a reasonable one, not on whether the member has complied with a union rule that can be defended as "reasonable." Although we agree with the Secretary that she is entitled to deference in this interpretation under *Chevron USA v. NRDC*, 467 U.S. 837 (1984), we do not discuss that doctrine further here, in part because the Secretary's brief discusses it at some length, and in part because, in light of the language and purposes of section 401(c), we think that the Secretary might well exceed her discretion if she were to construe the statute as petitioners do.

The reasons in support of this interpretation appear on the face of the statute. First, section 401(c)'s own language plainly requires unions to comply with "reasonable requests," and does not require union members to comply with "reasonable rules" in making their mailing requests. Second, the language of section 401(c) contrasts sharply with language in several other sections of the LMRDA, such as sections 101(a)(1) and 101(a)(2), which provide that speech and voting rights are subject to "reasonable rules" in the union's constitution. In addition, section 401(e) makes the right of every member in good standing to run for office subject to "reasonable qualifications," which is the functional equivalent of allowing reasonable rules. Evidently, Congress knew how to write a statute in such a way when it wanted a member's rights to turn on compliance with reasonable rules, but it chose not to do so in the case of campaign mailings.

The unions seek to avoid the force of this argument by invoking the well-known warning of Archibald Cox that courts should look to Congress' objectives and avoid "placing too great emphasis on close construction of words." *E.g.*, Pet. Br. 13 n.2. But when the rival objectives in question are so vague as "union self-government" and "union democracy," this formulation is an open invitation for the courts to simply make up statutory standards as they go along, ignoring the most reliable guide to Congress' intent — the words used by Congress. *See, e.g., Chan v. Korean Air Lines*, 109 S. Ct. 1676, 1683-1684 (1989). Surely, a court could not simply ignore the plain language when the contrast is so clear as between section 401(c) and the other LMRDA provisions cited above.

Nor is the difference between "reasonable requests" and "reasonable rules" merely a semantic one. The real impact of the distinction between "reasonable rules" and "reasonable requests" is to determine whose judgment about what is reasonable receives deference — the union, whose judgments are made by the incumbents, who naturally will seek to minimize the opportunity of their potential opponents to campaign, or the insurgents, who will seek to maximize their opportunity to campaign consistent with their

ability to pay for mailings? If a court asks whether a union's rule is "reasonable," it will give a measure of deference to the union's judgment about what time periods and other conditions are appropriate. The Secretary's "reasonable request" approach, by contrast, gives deference to the judgment of the candidate who seeks to use the union's mailing about when and how often he wishes to pay for this particular form of campaign promotion. If the union objects to the mailing at that point in time, the validity of the union's objection is determined *de novo*, subject to appropriate deference to the Secretary's expertise, but the request will be enforced so long as the candidate's choice is within the range of reasonableness.

Put another way, in the particular circumstances of any union, there will presumably be a range of requests that will be reasonable, as well as a range of possible union rules that will be reasonable. Some union rules might be reasonable because, in most circumstances, they afford sufficient opportunity to campaign, even though some candidates might have special needs, peculiar to their own circumstances, that would make their requests for the opportunity to campaign reasonable even though, in most circumstances, such requests could reasonably be denied. Under the "reasonable rule" approach, the fact that most candidates would be given an adequate opportunity to campaign would be enough to warrant upholding the rule and denying an otherwise reasonable request.

There are a number of reasons related to the purposes of the statute that counsel adoption of the Secretary's approach. First, if every requester who wishes to make a mailing that is apparently forbidden by a union's rules or past practices has to show that the union follows an unreasonable rule, that requester must presumably mount proofs concerning the entire range of requests that are permitted or forbidden by the union's rule, showing that the number of reasonable requests that are outlawed by the union's rule is more than minimal. In effect, every such case becomes a challenge to the union's entire system. However, these cases typically arise in a preliminary injunction posture, with the balloting looming and with very little time available for judicial determination. If, as hap-

pened here, the union tries to avoid service, JA 48-49, 55-56, the time for a hearing is even further reduced. A construction of the statute that turns every case into a challenge to the union's electoral process as a whole would make it difficult, if not impossible, for the courts to live up to Senator Javits' assurance that "the courts will act, and act in time." II *Legis. Hist.* at 1241.

Moreover, an interpretation of section 401(c) requiring deference to union rules on campaign mailings will have the effect of assisting union incumbents in staving off challenges to their control of the union. The fine words in petitioners' brief about the desirability of allowing union members to govern their own elections, Pet. Br. 15, *see also* AFL-CIO Br. 12, completely ignores that it is the incumbents who write and construe the rules, and they obviously do so in their own interests. If, as Professor Summers and virtually all commentators note, most unions are one-party states, a construction of the statute that requires deference to the union's rules would be tantamount to deferring to the judgment of Communist Party officials in making and construing rules about when and where opposition parties may campaign in the democratic elections now sweeping through Eastern Europe. It is, indeed, a standard tactic, when a totalitarian country decides to go through the motions of holding a plebiscite, to bar campaigning until a week or so before the balloting, which is the effect of the union rule at issue here. The Court has repeatedly stated that it is appropriate to construe labor statutes in light of the "realities of labor relations and litigation," *DelCostello v. Teamsters*, 462 U.S. 151, 167, 172 (1983), and it is surely appropriate to construe the LMRDA in light of the practical reality that most unions operate as one-party states.

Construction of the statute in a way that denies any deference to union judgments is particularly appropriate with respect to campaign mailings because of the absence of any significant union interest in limiting the right to campaign. After all, Congress avoided imposing on the union's legitimate interests both by crafting the compromise whereby union lists would remain confidential in return for having the union be responsible for doing the mailings, and by

providing that the member must bear all of the costs of preparing and mailing the literature.

Indeed, a consideration of the financial incentives concerning campaign mailings that affect both incumbents and insurgents shows why it is more appropriate to allow insurgents to act within the full range of reasonableness than to give a comparable freedom of action to incumbents. Incumbents, who by virtue of their positions are in daily contact with the membership and control the regular channels of communication within the union, such as the union newspaper, have no incentive to err on the side of making mailings any more available than section 401(c) absolutely requires. Moreover, if the question of reasonableness is a close one that may have to be litigated, they know that they can direct union counsel to defend, at union expense, whatever position they may adopt concerning a particular mailing.

Insurgent candidates, on the other hand, have every incentive to limit mailings to those that are truly needed for a successful candidacy, because of the portion of section 401(c) requiring candidates to pay the expenses of the mailing. Indeed, a candidate who knows that the question of reasonableness is a close one and thinks that the union may resist making the mailing, must find counsel and pay at least the costs of the litigation, if not a substantial retainer for the litigation of the case. Most union candidates have a discrete amount of money that they can raise for their campaigns, and it would be most surprising if candidates were to spend money on mailings at a time when it would do them no good, or with a frequency that would numb the member-recipients and lead them to ignore future campaign mailings from those candidates. For these reasons, in cases in which the reasonableness of the request is a close question, insurgent candidates will be more likely to lean in the direction of not doing the mailing.[6]

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[6]The part of the financial disincentive for insisting on a mailing, that is created by the need to pay for litigation, may be reduced, but not eliminated, by the availability of an attorney fee award under the common benefit doctrine. *Hall v. Cole*, 412 U.S. 1 (1973) (free speech under Title

(footnote continued)

Some union rules do not raise comparable concerns of favoring incumbents over insurgents because they do not effectively impose any substantive limits on the opposition's right to campaign; rather, they simply set forth a neutral procedure by which mailings are to be done. For example, the statute makes clear that members may be required to bear the expense of mailings, and a union might insist that payment be made in a particular form (such as money order or certified check). Similarly, the statute requires the member to make a request, and a union could presumably insist on a particular form of delivery of the request (such as certified rather than first-class mail), in order to ensure an adequate record of the request and its receipt. Or, where the union's list is not maintained in computerized form, and it actually requires substantial labor to produce a complete set of labels or to affix addresses to envelopes, a union might reasonably require sufficient advance notice to be able to complete a timely mailing.

Rules of this kind do not impose any substantial limits on the right to do campaign mailings. Indeed, in order for the union to implement the statutory command to do mailings, it must have some sort of procedure for doing them, and Congress' objectives of fostering real competition for offices within unions are in no way offended if courts give some deference to a union's judgments about the sort of "housekeeping" procedures that need to be followed in order to comply with actual administrative constraints. But where the union's rule actually limits the statutory right by imposing a procedural obstacle that cannot be avoided simply by filling out the right form on the right date — such as a rule limiting the number of mailings or limiting the time when mailings may be done — the union's

I of the LMRDA); *Mims v. Teamsters Local 728*, 821 F.2d 1568 (11th Cir. 1987) (applied to section 401(c) case). However, even in that event, few lawyers are willing to take such cases on a purely contingent basis, without a retainer for costs and some fees, and so, at the very least, the candidate will have to pay for the litigation during the course of the campaign and hope for reimbursement later. However, even if the candidate can be reimbursed in that fashion, the need to prosecute a case under section 401(c) deprives the candidate of cash that is needed for use during the campaign.

judgment should receive no deference, and the sole question should be, as the lower courts held, whether the candidate's request is reasonable.

Petitioners take the lower courts to task for portraying union elections as a Manichaean contest between insurgents and incumbents, overemphasizing "the supposed advantages of incumbency," and ignoring the fact that some elections are contested between non-incumbents. Pet. Br. 19. But the courts below did no more than follow Congress' judgment in enacting section 401(c), because, as the legislative debates cited above show, this provision was inserted precisely because Congress recognized the advantages of incumbency and desired to neutralize them. Specifically, Congress recognized that incumbents do not ordinarily need access to the mailing list because they enjoy contact with the membership year-round, while non-incumbents do need such access. Indeed, even in construing other portions of the statute, this Court has not hesitated to take into account the ways in which union rules can operate to perpetuate a one-party structure and to prevent electoral challenges by any member not favored by the incumbents. *Wirtz v. Hotel Employees Local 6*, 391 U.S. 492 (1968). Thus, a construction of section 401(c) that is built on recognition of the functional advantages of incumbency, and that is intended to make it easier for nonincumbents to do mailings and make it harder for incumbents to handicap or deny the right to do mailings, is in harmony with Congress' intent in passing section 401(c).

It is true that, sometimes, incumbents retire, and the contest is between two non-incumbents.[7] However, even in such instances,

[7]We use the word "sometimes" advisedly in referring to incumbents who retire by not running for reelection. The far more common route of succession is for the incumbent to retire (or die) during his term of office, allowing the executive board to pick a successor without an election. *See, e.g.*, Quaglieri, *The New People of Power: The Backgrounds and Careers of Top Labor Leaders*, 9 J. Lab. Research 272, 279-280 (1988); Lipset, Trow & Coleman, *Union Democracy* 148 (1956). *See also* 29 C.F.R. § 452.25 (no election required to fill vacancy). The appointed successor then runs as an incumbent in the next election.

the one-party nature of most union polities means that the contest is usually between a candidate supported by the official family (such as the union's second-ranking officer) and someone who recognizes that the absence of an incumbent provides the best possible opportunity for an outsider to break the cycle of incumbent re-election. Even if the official family's candidate lacks the personal name-recognition and other advantages that are enjoyed by the long-time principal officer of a union, he still enjoys the advantages of patronage and other aid that the official family can offer. *See* James, *Union Democracy and the LMRDA*, 13 Harv. C.R.-C.L. L. Rev. 247, 270-283 (1978), for an account of many of these advantages. In any event, the possibility that some elections may be contested without one side enjoying the advantages of incumbency does not mean that section 401(c) should not be construed in a way that fits the practical politics of the great majority of intra-union contests.

Petitioners suggest, however, that the "reasonable request" approach requires the courts to make reasonableness determinations in a vacuum, without any reference to the facts of the particular case, and that only the "reasonable rule" approach gives the court a context within which to determine the reasonableness of the union's decision to deny the request. But it is not the existence of the union rule that gives a court the context — it is, rather, the factual circumstances facing the union and the candidates that will determine the reasonableness either of the union's rules or of the candidate's request.

The circumstances of this case show why the "reasonable rule" approach gives the courts no greater "factual context" than the "reasonable request" approach. The union "rule" provides that mailings may only be done after the convention, and that is said to be justified on the ground that no "balloting committee" or "balloting agency" is selected until then. That the union does not pick those bodies until after the convention is a fact that courts can consider, and here did consider, in deciding either the reasonableness of the request or the reasonableness of a rule that bars mailings before these bodies have been chosen. The court below came to

the conclusion that, whatever petitioners' intent, the effect of the rule against pre-convention mailings was to place undue limits on the ability of an insurgent candidate to get his message out to the voters, when the incumbents have had a full four years of control of the union press and other levers of power to make themselves familiar to the voters. JA 83-84. Indeed, as we argue below, at 33-34, the effect of the rule is to bar any campaign mailings until the few days before the ballots themselves are mailed. But it is hard to see how the mere fact that the union chooses not to gear itself up to deal with election mailings until after the convention contributes much of anything to the analysis of whether it is reasonable for the union to take that position.[8]

In summary, then, there is no reason to give union leaders the extra assistance in perpetuating themselves in office that a rule of deference would do, and every reason for the courts to leave it to a candidate, subject only to a rule of reasonableness, to decide when a campaign mailing should be done.

2. Deference to Union Judgments About What Restrictions on Campaign Mailings Are Reasonable Is Not Needed to Avoid Discrimination or to Encourage Unions to Limit the Discretion of the Incumbent Leaders.

Petitioners' principal argument in defense of the "reasonable rule" approach is that the "reasonable request" approach is contrary to a sentence in the Secretary's regulations that encourages unions to adopt rules governing campaign mailings so that candidates will know in advance what procedures they have to follow, and will not claim that they have been subjected to discrimination. 29 C.F.R.

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[8]Petitioners' Question Presented errs in asserting that the decision below "precludes consideration of the union's rule regulating distribution of campaign literature." The court of appeals considered the rule; it simply refused to give decisive weight to a determination of whether the rule was reasonable.

§ 452.67.[9] This approach, the court concluded in *Donovan v. Philadelphia Metropolitan Council of Carpenters*, 797 F.2d 140 (3d Cir. 1986), and the union argues here, comports with the important statutory policy of preventing discrimination. The argument is, however, seriously flawed because the Secretary's regulation can be construed in a way that advances the goals of non-discrimination and union democracy without conflicting with her adoption of the reasonable request approach. Moreover, as the facts of this case demonstrate, deference to union rules would encourage incumbents to discriminate against insurgent mailings, and when a union rule is disregarded because it would have barred a reasonable request, no post-election charge of discrimination is either likely or meritorious.

First, we agree, the lower courts agreed, and the Secretary agrees, with the concern expressed by *Carpenters* about avoiding discrimination. But that does not mean that a union can avoid its obligation to comply with "all reasonable requests" simply by adopting a rule that is facially non-discriminatory, regardless of its content; rather, such a rule is lawful only if it requires the union to comply with all reasonable requests. And, in deciding whether the rule meets that standard, there is no requirement that either the Secretary or the courts give any deference to the union's views about what is reasonable.[10]

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[9] "The Act imposes the duty on the union and its officers to comply with all reasonable requests of any candidate to distribute his campaign literature at his expense. When the organization or its officers authorize distribution of campaign literature on behalf of any candidate, similar distribution under the same conditions must be made for any other candidate, if he requests it. In order to avoid charges of disparity of treatment among candidates, it is advised that a union inform all candidates in advance of the conditions under which distribution will be made and promptly advise them of any change in those conditions."

[10] As we suggested *supra*, at 22-23, it may be appropriate to give some deference when a union applies neutral procedural rules, such as those governing requests' format, manner of delivery, or manner of payment, that notify members of what they need to do to accommodate genuine administrative constraints, but do not limit the requests that may be made.

Moreover, the union's argument focuses unduly on the anti-discrimination portion of the statute, to the detriment of the union's affirmative obligation to comply with "all reasonable requests." Congress decided to include *both* a rule against discrimination *and* a rule requiring compliance with all reasonable requests, and there is no basis for giving the former rule primacy over the latter. The Secretary's regulation simply points out that unions have both obligations, and suggests a way for unions to protect themselves by giving notice of what they intend to do in light of both obligations and of any technical or administrative limitations to which they may be subject. The regulation does not purport to override the affirmative obligations in the statute, nor, in our view, could the Secretary do so even if she tried.

Nor, as the court below recognized, JA 84, would the union have been open to a charge of discrimination had it simply allowed respondent to do the mailing. First, there would be no discrimination unless some other candidate for the same union office made a request to do a mailing during the summer before the convention and had the request denied; however, so far as the record reflects, there were no other requests for this right by any other candidate for union office. Indeed, the union conceded at oral argument in the district court that there were only two candidates for President in the previous election, in 1984, and the only candidates for President in 1988 were respondent and the incumbent, petitioner Lowen. Because there were no other persons similarly situated to respondent, petitioners could not have discriminated against anybody by granting respondent's request.

Petitioners' concern that some other candidate might not learn about the availability of a pre-convention mailing is an effort to bootstrap a past violation of the statute into a permanent one. The union could always communicate the availability of such mailings to all announced candidates or to the full membership, in its newspaper or otherwise. Certainly petitioner Lowen, the incumbent against whom respondent was running, was aware of that opportunity and could not claim discrimination. Indeed, if petitioners had promptly

granted respondent's request when he first made it on May 9, 1988, they could easily have communicated with any other candidates in time for all of them who wanted to do a mailing before this suit was filed in mid-July. Moreover, as petitioners conceded below, JA 66, the union mailed out a special issue of its newspaper, containing a notice of the opportunity to make nominations, the week after this action was filed.

Petitioners could easily have taken advantage of that opportunity to notify the membership of a change in mailing procedures, as well as of the upcoming nominations, but they chose not to do so. In those circumstances, petitioners' breast-beating about possible discrimination against unknown candidates, based on lack of notice of the opportunity to match respondent's request, would simply convert the existence of a union rule, regardless of whether or not it is reasonable, into a foolproof barrier against having to do mailings for insurgents any earlier than the incumbents want to allow them. The courts below properly refused to permit the incumbents to take advantage of their own laggardly response to the request and their stubborn refusal to acknowledge their statutory obligations, as a basis for claiming that respondent's statutory rights should be denied because there was no longer sufficient time to notify other potential candidates.

In this regard, it is worthy of note that 29 C.F.R. § 452.67 does not call for the establishment of union "rules" which must be followed without variation during the course of the election and which are to be given deference by the Secretary or the courts. To the contrary, the regulation simply calls for advance notice *and for prompt notice of any changes in those conditions*. It is thus hard to understand how this regulation can be construed as endorsing the "reasonable rule" focus on which petitioners insist.

Petitioners and their *amicus* make much of the desirability of union rules concerning mailings as a means to limit the discretion of union officials and thus prevent discrimination against disfavored candidates. The "reasonable request" approach, it is said, discourages unions from making rules that limit official discretion because it would

deny any preclusive effect to those rules. AFL-CIO Br. 20; Pet. Br. 15. There are, however, two flaws in this reasoning.

First, the reasonable request approach does not preclude the issuance of rules; it simply denies deference to a union rule insofar as the rule forbids mailings in response to reasonable requests. *See* LMRDA Section 401(e) (union constitution and bylaws must be followed only "insofar as they are not inconsistent with the provisions of" Title IV). A union may choose to have a rule in order to provide a form of notice to the membership of what sort of mailings will be permitted, and so long as the rule requires the union, at a minimum, to honor all reasonable requests, the union can be sure that following the rule will protect it against a finding that it violated rights under Title IV. Such a rule would confine official discretion in those circumstances in which the request would not be deemed "reasonable" by the courts and in which the union, absent the rule, would be permitted to deny the mailing request. A union that chooses to allow members to do more than the law requires would be protected; it is only the rule that does *not* require compliance with all requests that the courts would judge reasonable that would not be honored. The only "discretion" that the reasonable request approach denies to union officials is the discretion to deny reasonable requests, and the union can scarcely complain that its incumbents need such discretion.

The second flaw in the argument that a "reasonable rule" approach is needed to encourage unions to adopt rules confining incumbent discretion is that, however appealing it may be as an abstract matter, it ignores who writes the rules and who decides how to apply them. Because most unions operate as one-party states, and because almost every national union writes its constitution at conventions which, as a rule, are controlled by the incumbents, *see* Hartley, *The Framework of Democracy in Union Government*, 32 Cath. L. Rev. 13, 70-75 (1982); James, *Union Democracy and the LMRDA*, 13 Harv. C.R.-C.L. L. Rev. 247, 261-262 (1978), rules governing campaign mailings represent the incumbents' effort to protect themselves against electoral challenges as best they can. Even when a union constitution is approved in

a referendum, as the IOMMP Constitution was, the leadership drafts the constitution and the members, here and in most cases, can only vote the entire document up or down. Even in the best of circumstances, then, constitutional provisions rarely represent the considered view of the membership about the best way to "diminish th[e] officers' discretion," AFL-CIO Br. 20, to ensure that electoral challenges will be possible. Moreover, few unions have independent judicial bodies to decide how rules should be applied; rather, appeals are decided by the executive officers, and when survival in office is at stake, decisions about construction and application of the rules are inevitably political, rather than confining the incumbents' discretion. Hartley, *supra*, 32 Cath. L. Rev. at 67-68.

For all these reasons, the court of appeals properly refused to make this case stand or fall on a determination of whether the union's rule was reasonable. Instead, the lower court properly took cognizance of the union rule in question, discussed its effects on union democracy, and correctly held that respondent's request was reasonable and should have been granted.

C. Even if A Request May Be Denied Based on a Reasonable Rule, There Was No Rule Here and the Union's Practice Was Not Reasonable.

Even if the Court disagrees with the Secretary's construction of the statute and decides that the focus of section 401(c) is on whether the union has a reasonable rule, the judgment below should be affirmed. That is so because here there was no "rule" against pre-convention mailings, and, even if the union's constitution is properly construed to include such a rule, that rule is unreasonable.

First, the IOMMP Constitution does not contain any prohibition on pre-convention campaign mailings. Petitioners have assumed throughout this case that their constitution so provides, but they have never pointed to any language so stating. Instead, they have relied on Article V, Section 10(a), which requires an "Impartial" Balloting Agency ("IBA") to make arrangements to protect the

security of the list, to pick a mailing service, and to notify candidates of the name of the service and the costs involved. JA 39-40. Because the IBA operates under the supervision of an International Balloting Committee ("IBC"), JA 36, and because both the IBA and the IBC are selected by the delegates at a convention, JA 26, 36, petitioners argue that mailings cannot possibly be done before these bodies have been selected.

The fact remains, however, that petitioners are reading a prohibition by implication into a constitution whose text contains no such language. The far better construction of the IOMMP Constitution is that, although mailings done after these bodies are selected are to be conducted under the aegis of the IBA and IBC, mailings done before that time are to be supervised by the incumbent union officials, which is how petitioners complied with the preliminary injunction that was entered in this case. Moreover, there were an IBC and an IBA selected at the previous convention (in 1984), and if the IOMMP's officers are too busy to supervise campaign mailings, Pet. Br. 24, then they could have used the IBC and IBA from the previous election to handle the matter.

In support of its construction of the IOMMP Constitution, petitioners will no doubt invoke the hoary rule that courts should generally defer to any reasonable construction that is placed on a union constitution by an official union body that is authorized by the constitution to promulgate official interpretations. *English v. Cunningham*, 282 F.2d 848, 850 (D.C. Cir. 1960). There are several reasons, however, why this general rule does not aid petitioners here. First, constitutional provisions that are invoked to limit Title IV rights must be construed narrowly, *Hodgson v. ILA Local 1418*, 76 LRRM 2556, 2557 (E.D. La. 1971); *see also Donovan v. Laborers Local 427*, 113 LRRM 3444, 3446 (N. D. Iowa 1983) (requiring "sound explanation" for application of a candidate eligibility rule to remove any candidate from ballot); *cf. Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (contract may be used to overcome statutory rights only if waiver is "explicitly stated" and "clear and unmistakable"), and so should be given that effect

only if the limitation appears on the face of the provision. Second, just as statutes should generally be construed to avoid questions of their consistency with a state or federal constitution, so union constitutions are generally construed to avoid a possible conflict with laws or public policies supporting union democracy. Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 Yale L. J. 176, 181-184 (1960); Summers, *Judicial Regulation of Union Elections*, 70 Yale L.J. 1229, 1233-1236 (1961), *citing, e.g., Irwin v. Possehl*, 143 Misc. 855, 257 N.Y.S. 597, 601 (Sup. Ct. 1932) ("the constitution and laws of every labor organization are to be judged and construed in this state and country according to well conceived ideals and principles of law ordained by a democratic people . . ..."). For these reasons, this canon of union constitutional construction does not apply to support the application of the constitutional provisions of the IOMMP constitution in a manner that would deny respondent's request to do a pre-convention mailing.

Finally, the record does not reflect that petitioners have rendered an official constitutional interpretation of the IOMMP Constitution. We may assume that no candidate has previously requested the right to do pre-convention mailings, although the record is silent on the point. Nevertheless, even that does not establish that the constitution so forbids, but only that the question has never arisen before. Petitioner Lowen has authority under the union constitution to construe it, but all the record contains is his affidavit, prepared solely for the purpose of this litigation, which states his view that the constitution forbids preconvention mailings but which, under these circumstances, is not entitled to deference. *See Alaniz v. OPM*, 728 F.2d 1460, 1465 (Fed. Cir. 1984). Thus, although the court of appeals assumed that there was a union "bylaw" forbidding preconvention mailings, JA 85, the absence of such a rule either in the text of the constitution or in an official interpretation makes it unnecessary for the Court to reach the question of whether a rule barring pre-convention mailings would be reasonable.

If the Court does reach that question, there is little question that

the rule is unreasonable.[11] Petitioners proceed under the assumption that the only consideration in determining whether a rule is reasonable is to decide whether it discriminates on its face between candidates. Pet. Br. 26-27. If that were so, however, the union's duty to comply with all reasonable requests to distribute campaign literature would provide little more assistance to would-be candidates than the rule against discrimination. Surely, the courts should also consider the effect of the rule on the candidates with the greatest need to exercise the right to have their literature distributed — candidates who are running against the incumbent officers.

Where the union's rule would, as here, invalidate most otherwise reasonable requests that a candidate running for office might make, the rule cannot be upheld. After all, the effect of petitioners' rule is to provide that a candidate for union office in a quadrennial election cannot begin to effectively reach the voters until a few days before the ballots are mailed. It is as if George Bush and Michael Dukakis, instead of being able to begin communicating their campaign positions to the voters in 1986, had had to wait until after the Republican and Democratic Conventions were held in the summer of 1988 (or, to make the analogy more precise, one would have assume that the conventions were not until October 1988), to begin their campaigns.

Under the union rule, mailings cannot even be done immediately after the convention ends. Thus, the IBA must wait until ten days after the convention to see whether all candidates will accept their

[11]We note that, unlike the references to the democratic traditions of the Steelworkers union that apparently influenced the Court in *Steelworkers v. Sadlowski*, 457 U.S. 102, 114 and n.7, 115 n.9 (1982), the IOMPP's record does not inspire similar confidence. To the contrary, the IOMMP is a union democracy scofflaw, in which judicial intervention has repeatedly been required to protect challengers against incumbents who abuse their control over union mailing lists and the election process generally. *E.g., Sheldon v. O'Callaghan*, 497 F.2d 1276 (2d Cir. 1974); *Usery v. IOMMP*, 422 F. Supp. 1221 (S.D.N.Y. 1976), *mod.*, 538 F.2d 946 (2d Cir. 1976); *Petrazullo v. Lowen*, 534 F. Supp. 173 (S.D.N.Y. 1982); *Hayes v. IOMMP*, 670 F. Supp. 1330 (D. Md. 1987). *See also* page 4, *supra*, describing ballot fraud in the most recent election.

nominations and have their eligibility certified. JA 60-61. At that point, the IBA selects a mailing agency, determines what the costs of mailings will be, prepares a letter notifying the candidates of these matters, and mails the letter to the candidates. Only then can the candidates begin to have their mailings processed.

In 1984, for example, the IBA's letter was dated August 15, JA 62, which was twenty days after the convention ended (July 27), and only twelve days before the ballots were mailed out (August 27). JA 57. And even after the mailing of the notification letter, it may take three days for the letter to reach the candidate; a day or so for the candidate to obtain a certified or cashier's check or money order and transmit it to the union in payment for the labels; a day or so for the union to place an order for printing of labels; another two or three days for the labels to be sent from Baltimore, where they are produced, to the mailing service which may be in another city (in 1984 it was in New York, JA 62); and an unspecified period of time for the mailing service to complete the mailing. Moreover, it is the notification letter that advises a candidate how many members there are in each of the union's membership groups and in the union overall, and so the candidate cannot place his printing order until that letter is received. Small wonder that, when pressed at oral argument in the district court, petitioners were only able to assure respondent that, if their rule were permitted to operate, his literature would be mailed "some period of time" before the ballots. JA 69. The few days thus allowed for doing union mailings is far less than was upheld as a reasonable restriction in *Carpenters*, and we think it clear that it is not a sufficient opportunity to campaign.[12]

[12]In *Marshall v. Meat Cutters Local 274*, 623 F.2d 1322 (9th Cir. 1980), not only did the rule require that mailing requests be made early in the election (at least fifty days before the balloting), rather than delaying the date when mailings could be done, but the Secretary did not challenge the reasonableness of the rule, only its application. *Id.* at 1325. Therefore, the decision there does not support the reasonableness of the IOMMP rule at issue here. In our view, however, there is some question whether it is reasonable to ***require*** a candidate to decide fifty days before the election whether he will need, and be able to afford, to do a mailing to the entire membership.

Petitioners have tried to save their rule by pointing out that the ballots need not be returned until ninety days after they are first mailed. However, the record shows that many members return their ballots almost immediately after they receive them, JA 14, 50, and the experience in other unions is similar. *E.g.*, *Bauman v. Presser*, 117 LRRM 2393, 2397 (D.D.C. 1984), *app. dism.*, 119 LRRM 2247 (D.C. Cir. 1985). It is for that reason that the courts have held that the relevant period, in determining whether there has been a sufficient time allowed for campaigning in an election or a referendum that is conducted by mail, is not the time between the beginning of the campaign and the counting of the ballots, but the time between the beginning of the campaign and the mailing of the ballots. *Bauman*, *supra*, 117 LRRM at 2400; *Marshall v. Teamsters Local 468*, 643 F.2d 575, 577 (9th Cir. 1980).[13]

Moreover, the union's procedures flatly contradict both the Secretary's regulations and the case law. Those regulations provide, and the case law is clear, that a candidate has the right to do a mailing to the membership during the period leading up to nominations (here, at the Convention), as well as after the nominations have been made. 29 C.F.R. § 452.80; *Brock v. Hotel Employees Local 471*, 706 F. Supp. 175, 182 (N.D.N.Y. 1989); *Camarata v. Teamsters*, 478 F. Supp. 321, 330 (D.D.C. 1979), *aff'd mem.*, 108 LRRM 2924 (D.C. Cir. 1981); *Morrissey v. Curran*, 356 F. Supp.

[13]The evidence supporting the proposition that most members vote as soon as they receive their ballots is not contradicted by petitoners' proffer of evidence "that members vote throughout the ninety day period." JA 68. After all, the work patterns of the members of the IOMMP often preclude them from returning home to pick up their mail for lengthy periods of time, and it is those workers who are away from home during the first weeks of balloting who are likely to vote late. Petitioners did not offer any proof about when the majority of the ballots are received, but in a close election such as the 1988 election which was decided by 110 votes out of 4500 votes cast, an insurgent needs to be sure that his messages are timely received by every voter. Moreover, as respondent argued below and the district court found, an early mailing was needed to ensure that members would receive his campaign messages in time to be able to discuss them with each other before they voted. JA 14, 78.

312, 314-315 (S.D.N.Y. 1973); *Yablonski v. UMW*, 71 LRRM 2606, 2606 (D.D.C. 1969). Indeed, the statutory provision allowing all "bona fide candidates" to do campaign mailings would be a nullity if rules allowing only nominated candidates to do mailings were reasonable, *Cotter v. Helmer*, 692 F. Supp. 313, 317 (S.D.N.Y. 1988), which is one effect of the rule at issue here.[14]

Nor can the union avoid its responsibilities under the Act because it makes arrangements with an independent agency to handle its balloting only after the convention has ended. Although a union may retain such an independent agency, the LMRDA places the obligation to do the mailing for union candidates on the *union*, not on its agent. *Wirtz v. AGVA*, 267 F. Supp. 527, 540-541 (S.D.N.Y. 1967); *Marshall v. Watchman's Local 2*, 100 LRRM 2744, 2747 (D.D.C. 1979). Indeed, the Secretary's regulations compel unions to hire extra staff if needed to ensure that all reasonable mailing requests can be honored. 29 C.F.R. § 452.69. Accordingly, petitioners' plea that its leadership is too busy to think about campaign mailings before the convention, Pet. Br. 24, is not a legitimate objection, and the union's delay in selecting an agency cannot be used as an excuse under section 401(c).

Finally, both the statute, which requires compliance with "*all* reasonable requests of any candidate," (emphasis added), and the case law, make it clear that union candidates may do more than one mailing. *Marshall v. Plumbers Local 654*, 99 LRRM 2943, 2944 (N.D. Tex. 1978). By effectively barring any mailings until a few days before the ballots are sent out, petitioners' rule effectively

[14]The fact that one reason for allowing mailings before nominations is to permit a candidate to secure sufficient support to obtain nomination, which does not apply to the IOMMP because respondent was a delegate and could nominate himself, does not detract from the other reasons why respondent wanted to be able to conduct a pre-nominations mailing — to head off other possible insurgent nominations and to encourage discussions between union members and the union opinion leaders before the latter came to attend the union convention.

precludes candidates from taking advantage of that right.[15] Surely, whatever else may be required before a union rule is found to be "reasonable," the rule must at least be consistent with applicable regulations and cases. Because the IOMMP rule fails this test also, it cannot be upheld.

Another way to approach the question of the reasonableness of petitioners' rule is to consider precisely what union interests it advances, what obstacles it places in the way of union democracy, and whether the union has other ways in which the same interests could be protected. This approach would be consistent with the Court's cases under section 401(e) of the Act, which authorizes unions to adopt "reasonable qualifications" to run for union office. This Court has held that Congress did not intend to give this exception a broad reach, and that only those qualifications that are truly necessary to advance important union interests can be upheld. *Steelworkers Local 3489 v. Usery*, 429 U.S. 305, 309-313 (1977); *Wirtz v. Hotel Employees Local 6*, 391 U.S. 492, 499 (1968). If the Court does decide to adopt a "reasonable rules" approach in this case, it should adopt a similarly strict standard to decide whether mailing rules are valid.

Under that standard, the ban on preconvention mailings certainly cannot be upheld. Petitioners have articulated only four interests in support of their rule.[16] The first two are union self-government, Pet. Br. 15, and the interest in avoiding discrimination by providing

[15]A candidate may also seek to save campaign funds by using a bulk mail permit, pursuant to which the literature may not be delivered to the members for several days after the material is delivered to the post office. Levy, *Electing Union Officers Under the LMRDA*, 5 Cardozo L. Rev. 737, 777-778 n.224 (1985). *See also Mims v. Teamsters Local 728*, 821 F.2d 1568 (11th Cir. 1987) (although not mentioned in opinion, that was reason for dispute over union delay in mailing). A candidate could certainly not take advantage of this right if the union can delay the mailing until a few days before the ballots themselves are mailed.

[16]*Amicus* AFL-CIO, by contrast, does not argue that petitioners have a reasonable rule; rather, it simply assumes such reasonableness *arguendo*. Br. at 5-6 n.4.

notice to all candidates in advance of the election of what mailings will be allowed. Pet. Br. 21. However, these interests prove too much because they are merely pleas for *any* rule, and thus could be used to support even the most restrictive and oppressive of rules, however unreasonable they might otherwise be.

Petitioners also suggest that the rule ensures that elections are handled by an independent committee composed of rank-and-file members, not by the incumbents themselves, thus providing an assurance of neutrality. Pet. Br. 23. However, IOMMP conventions are held every two years, JA 17, and if the union insists on using the IBA and IBC to handle all mailings, but is unwilling to rely upon the IBC and IBA elected during the 1984 convention to handle mailings before the 1988 convention, it could easily select a new IBA and IBC at the intervening convention in 1986 to handle requests that are made during the next two years. Moreover, if an insurgent candidate wants to have campaign mailings done before the convention badly enough to run the risk that the incumbents will manage his mailing less favorably than a supposedly independent body would do, it is hard to understand why the candidate should not be allowed to take that risk.[17]

The final interest asserted by petitioners is in avoiding mailings by persons who are not eligible to run for union office. Pet. Br. 24. It is hard to see how this interest helps petitioners here, inasmuch as they conceded in the lower courts that respondent was

[17]Nor is there any reason to believe that the IBC is any more neutral than the incumbents would be, because its members are selected by whoever controls the most votes at the convention. Indeed, the delegates to an IOMMP convention in the year of nominations for IOMMP office are not elected as delegates in the few months preceding the convention, as is done in most unions and in the Republican and Democratic parties. Instead, convention delegates are elected during the same four-year cycle as the union's officers. Thus, for example, the IBC and IBA selected at the 1988 convention, to supervise the election in which a set of candidates were to run against the incumbents who had won in 1984, were picked by delegates who had been elected during the elections following the 1984 convention along with the very same incumbent officers.

eligible to run for office. In any event, if a union could show that it had a valid eligibility rule and that it could be sure that a would-be candidate would not qualify to run for office, that would be a valid defense to a section 401(c) claim. For example, if a candidate had either joined the union or started working at the craft at a time less than twenty-four months before the election, the union could be sure that the member would not meet a continuous good standing rule that would be deemed valid under the Secretary's regulations. 29 C.F.R. §§ 452.37, 452.41.

On the other hand, a rule that bars campaign mailings until just before the ballots are mailed obviously makes it very difficult for a non-incumbent to run for union office, especially in a national maritime union such as the IOMMP where the membership is widely dispersed. The problem is compounded in the IOMMP where, according to the undisputed evidence, "the union's newspaper is the principal and only regular source of news which members have about union affairs," the leadership controls the newspaper and screens out any membership contributions which are deemed "political," and the leadership uses its control of the paper to include a "steady barrage of information favoring the policies espoused by the incumbents" and "to promote their own views of the problems facing the union." JA 13-14.

Petitioners assert that they were entitled to a trial in order to put on evidence supporting the reasonableness of their rule. Pet. Br. 26 and n.9, 28. However, the facts on which respondent has relied, both in this Court and below, to establish the unreasonableness of the union's rule are essentially undisputed, and petitioners argued to the district court that the case should be decided on affidavits unless there were "factual conflicts." JA 65. Moreover, even when petitioners began to make proffers about possible testimony once the argument in the district court seemed to turn against them, none of the proffers contradicted respondent's evidence about the incumbents' use of the channels of communication within the union, about voters tending to cast their ballots immediately upon receipt, or about the need for pre-convention mail-

ings. Even assuming the truth of petitioners' proffers, there is no basis for remanding this case for a trial concerning the reasonableness of the union's rule.[18]

Thus, the IOMMP rule, if it is a rule, is an unreasonable one because it violates the LMRDA, it severely undermines insurgents' opportunities to mount an effective challenge to incumbents, and it is not needed to advance any legitimate union objective. Accordingly, the rule cannot be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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September 26, 1990

[18]All of the proffers are set forth at JA 66-69, 72.

FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, ROBERT J. LOWEN, and F. ELWOOD KYSER,
Petitioners,

v.

TIMOTHY A. BROWN,
Respondent.

On Writ of Certiorari to the Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1330

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, ROBERT J. LOWEN, and F. ELWOOD KYSER,
Petitioners,

v.

TIMOTHY A. BROWN,
Respondent.

On Writ of Certiorari to the Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

STATEMENT OF THE CASE

In the statement of facts set forth in his brief, respondent states that after the entry of the preliminary injunction in this case, the IOMM&P election was held and that "the incumbents ensured their election by stuffing the ballot box." Resp. Br. 4. This is a reference to a proceeding brought by the Department of Labor challenging the results of the 1988 election, which was recently heard and decided in the U.S. District Court for

the District of Maryland. The Court should disregard this appeal to prejudice for two reasons.

First, the claim is a false and blatant mischaracterization of those proceedings—there was no evidence presented at the trial and no finding by the District Court that either of the incumbents had anything whatsoever to do with the casting of fraudulent ballots or the lack of adequate safeguards.

The issues in that case involved balloting in a membership group of the union located in Panama. In September 1988, prior to the mailing of the ballots, written petitions signed by 180 members employed by the Panama Canal Commission were sent to the American Arbitration Association, which had been designated to serve as the Impartial Balloting Agency by the delegates to the August nominating convention and the International Ballot Committee, which had also been elected by the convention delegates, alerting them to the political unrest in Panama and the unreliability of the Panama mail system. A current postal strike was also cited. The petitioners asked that some alternate means to providing ballots to the Panamanian member, other than through the mails, be devised.

In response to the emerging situation, the American Arbitration Association arranged to forward the ballots to a bank in Panama rather than mailing them directly, where they could be picked up by members upon showing proper identification.

No contention was ever made in the litigation that the incumbents had anything to do with the events that occurred in Panama or with the decision to utilize the Panama Bank, and, in fact, no one ever contended that the incumbents even knew of these events until a challenge was raised after the conclusion of the balloting. Moreover, the court did not find that respondent would have won the election, although it found that the violations might

have affected the outcome of the election because Lowen's winning margin might have come from Panama, where *some* votes were affected by violations. (Tr. 21).

Second, this allegation has nothing to do with the issues in this case. Respondent apparently has little confidence in the validity of his arguments concerning the merits of these issues. The insertion of this inaccurate description is a patent attempt to cause the Court to decide this case not upon its merits, but upon the theory that the incumbents are bad people. This hardly has any relevance to the issue on which certiorari was granted.

ARGUMENT

IN ORDER TO BEST SERVE THE DUAL GOALS OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT ("LMRDA"), THE TEST OF COMPLIANCE WITH § 401(C) SHOULD BE WHETHER PETITIONERS HAVE FOLLOWED ALL REASONABLE RULES GOVERNING THE MAILING OF CAMPAIGN MATERIALS.

The issue in this case is how to properly interpret § 401(c) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 481(c). This section imposes a duty upon unions and officers to:

> comply with all *reasonable* requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization. (emphasis added).

The parties' dispute involves whether the reasonableness of a request is determined by looking at the request alone, or by examining whether the request complies with reasonable union constitutional provisions governing election procedure. As respondent pointed out, Resp. Br. 18, the dispute is more than semantic, for it affects the entire balance of power among the union, union candidates, and the federal government.

This concern with the balance of power is a central and recurring theme of the LMRDA, because the statute, including § 401(c), was designed to achieve union democracy through autonomous self-government, subject to intrusions by the federal government only where necessary for the enforcement of minimum standards of conduct necessary to avoid abuse. Respondent's argument, however, focuses only on some of those considerations. It thus distorts the meaning and purpose of the statute.

A. The Words of the Statute Permit the Adoption of Reasonable Rules Regulating Distribution of Campaign Literature.

Much weight is placed by respondent and the amici who support him upon the fact that no express mention of union rules is made in the language of section 401(c) governing mailings of literature, and the verbal contrast between this subsection and the language of other sections which make reference to such rules. Resp. Br. 18. This supposed difference has little significance.[1] Because of the manner in which the LMRDA was enacted, its language is rife with ambiguities, both intentional and unintentional, particularly the compromise sections written largely upon the floor of Congress. Cox, Internal Affairs of Unions Under The Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 833 (1960); Smith, The Labor-Management Reporting and Disclosure Act of 1959, 46 Virginia L. Rev. 195, 197-198 (1960). Therefore, undue emphasis cannot be placed upon the exact phraseology used in the statute.

The United States makes the argument that because of the manner in which the language contained in section

[1] Title I provides that: "Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force and effect." Section 101(b); 29 U.S.C. § 411(b). On this logic, one could argue with equal force that the absence of such language in section 401(c) is significant.

401(c) was adopted, the failure to insert an express proviso making mailings of literature subject to union rules indicates a legislative intent that such rules have no force in assessing the reasonableness of such requests. United States Br. 22-23. This argument reads far too much into the legislative history. It is true that this language was offered by Senator Javits as an amendment to the "Bill of Rights" proposed by Senator McClellan. However, the main point of the Javits amendment in the context of the pending debate was to confer the right to bring proceedings in federal court if discrimination with respect to mailing lists existed. See 105 Cong. Rec. 6021, 2 NLRB, Legislative History of the LMRDA (1960) at 1230 (hereinafter "Legislative History") (statement of Senator Kuchel). In fact, with the exception of that right, the language of the Javits amendment was quite similar to the language that already appeared in S. 1555 relating to the requirement of making campaign mailings on behalf of candidates and forbidding discrimination in the use of lists. Compare S. 1555, 86th Cong., 1st Sess. § 301(b), 1 Leg. Hist. 372 with 105 Cong. Rec. 6727-28, 2 Leg. Hist. 1240.

In contrast to the language of the Kuchel amendment, the language of the Javits amendment was never extensively debated. 105 Cong. Rec. 6727-28, 2 Leg. Hist. at 1240-1242. Thus, there is no evidence that Congress ever focused upon the question of how to determine what requests were reasonable, which, as petitioners have previously argued, is a necessary dilemma presented by the language itself.

Moreover, other factors in the legislative history support the construction of the statute urged by petitioners. It is apparent that one of the most significant concerns voiced in the Senate in connection with the campaign literature question was the possibility of discrimination in the use of lists. 105 Cong. Rec. 6021, 6727, 2 Leg. Hist. at 1230, 1240. As petitioners have argued, the ad-

vantage of a construction that permits regulation by union rules is that it eliminates the possibility for discrimination. Pet. Br. 21.

It would have been much simpler for respondent's argument if Congress had used the language "all requests," rather than "all reasonable requests." In the end, respondent's argument about the meaning of the statute cannot be squared with its language. This is demonstrated by the brief of the Association for Union Democracy, which frankly asks that the word reasonable be read out of the statute. Ass'n. Br. 20. Under this standard, there would be no requests that are not reasonable.

B. The Construction of Section 401(c) Urged by Respondent Is Not Supported by the Legislative Goals.

The essence of respondent's argument is that because incumbent officials enjoy advantages due to their incumbency, the statute must be interpreted in a way that overcomes this advantage. According to respondent and the amici who support his position, this is the only policy that may be given effect. There are two problems with this argument. First, interpreting the statute in this fashion does violence to its meaning. Second, it ignores the balance that was struck by Congress in enacting the statute.

First, it is readily apparent that the only interpretation that would serve the nonincumbents' interest in communication with the members would be one that placed no restriction at all upon the right to make mailings. That interpretation runs afoul of the statute's language. By limiting the right to make mailings to those that are reasonable, Congress itself rejected the interest in unlimited communication. As petitioners have previously argued, this case is about the process for determining the meaning of that limitation.

Second, the balance of competing interests has already been struck, and respondent is attempting to upset that

balance. LMRDA was a compromise, and it is clear that in fashioning the statute Congress sought to avoid unnecessary invasion of unions' power to govern themselves. Congress's desire to avoid unnecessary governmental intervention is a theme which runs throughout the legislative history of the LMRDA, and was intended to define the underlying structure of the provisions governing the union's conduct of elections. Contrary to respondent's suggestion, Resp. Br. at 16, these comments are not limited to the discussion in the original Kennedy-Ives bill regarding statutory recognition of codes of ethical behavior. They also appear in the Senate Report concerning S. 1555. S. Rep. No. 187, 86th Cong., 1st Sess., 1 Leg. Hist. 401, 403.

This concern was carried forward and expressed repeatedly throughout the debate. While much of that debate did concern the "Bill of Rights" provision, that debate immediately preceded the discussion of the Javits Amendment.[2] It is indeed a crabbed interpretation of the legislative history to argue that a Congress concerned in one breath with guarding against unnecessary inroads on union autonomy forsook that intention in the next breath.

Nor is this Court's recognition of the balance between competing objectives limited to a "fragment" in *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982). It has been identified in several holdings as one of the policies underlying the statute. *See* Pet. Br. 14. *See also* Beaird, Some Aspects of the LMRDA "Bill of Rights", 5 Georgia L. Rev. 661, 662 (1971); Griffin, The Landrum-Griffin Act: Twelve Years of Experience in Protecting Employee Rights, 5 Georgia L. Rev. 622 (1971).

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[2] There is little else available in the way of debate because there were few changes to the election provisions during the legislative process. Rezler, Union Elections, The Background of Title IV of LMRDA in Slovenko, Symposium on The LMRDA 491, 492.

The fact that respondent seeks to upset the balance achieved by LMRDA is exemplified by his arguments regarding the alleged advantage held by the incumbents through the use of union newsletters. Respondent asserts that this advantage must be given exclusive weight in construing the statute, because the fact of misuse of this advantage prior to creation of the LMRDA caused Congress to conclude that union candidates have an "absolute right to do membership mailings without a showing of discrimination." Resp. Br. 15. However, Congress created an independent remedy for such misuse. Section 401(g) prohibits union officers from using resources, including union newspapers, in order to promote their own candidacy. A remedy is provided for misuse of an incumbent's advantage, and where such misuse occurs the courts have imposed remedies. E.g., *Yablonski v. United Mine Workers*, 305 F. Supp. 868 (D.D.C. 1969). The determinant of whether this factor should result in government intervention in the union's conduct of an election is whether it has been abused.[3]

In the district court, respondent alleged in general terms that the IOMM&P incumbents controlled channels of communication. Respondent never submitted extrinsic evidence in support of these allegations.[4] Petitioners pointed out that respondent had been a delegate for years and had been making mailings to the membership through his own mailing lists since a date as early as 1977 (Memorandum in Opposition To Motion For Preliminary Injunction, Exhibits C through G). Because of the lack

[3] As Professor Cox stated, no legislation could completely nullify the advantages of incumbency. Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 844 (1960).

[4] Due to the District Court's decision not to admit any extrinsic evidence regarding the facts of the case, but to simply decide the case on the documents submitted at District Court, Petitioners have been precluded from presenting further evidence on this or other factual issues. JA 72-73.

of any support in the record or in fact for the notion that the incumbents abused their access to the membership through the union newspaper, respondent now seeks to argue that the Court may take judicial notice of this "fact" which must be considered in construing this statute. This is simply an attempt to rectify the omission of a fact from the proof, and should be rejected.

C. The Legislative Goals of the LMRDA Are Unduly Frustrated by the Ad Hoc Approach Suggested by Respondent.

Another defect in respondent's interpretation of section 401(c) is his assumption that a standardless reasonability interpretation will best promote the statutory goal of assuring a fair balance of power between incumbents and insurgents in elections. Such an interpretation simply shifts control of the decision-making regarding the reasonableness of a request away from the union majority and the insurgents, and places it in the hands of the incumbents, without limitation. If this ad hoc approach is used, the union officials could act without regard to any limits placed by the union majority. It also weakens the power of the courts to determine the reasonableness of a request, by not allowing the court to consider the realities of the electoral process of a union as they are expressed in the union's rules and regulations. Moreover, this approach would deteriorate the consistency of any court rulings, and thus would provide little guidance to future candidates as to the propriety of a particular mailing request. It would also lead to more disputes regarding compliance with section 401(c), thus taxing the financial and human resources of candidates, unions, and the federal government.

In contrast, if the standard of reasonableness is decided in advance by a union majority, many of the concerns raised by respondent would be eliminated. For example, rules setting standard procedure for election procedures and proceedings, including mailing requests, would limit

the discretion of union officials, and thus their ability to abuse this power. Moreover, it would be consistent with the larger goals of the LMRDA, as it would ensure the union's right to assist in determining what constitutes a reasonable request, by advising of particular needs and problems of that union's election procedure. While the union constitutional provisions reflect the majority and desire of the union, they also reflect a particularized knowledge of the needs and problems of the union members and the proper means for running an election.

Finally, construing the section to give effect to union majority rules does not give the union unlimited power over the operation of its elections; rather, it simply creates the presumption that the decision of the union officers in complying with the union regulations satisfies the requirements of section 401(c). Clearly, this presumption could be overcome by proof that the rule is unreasonable or applied in a discriminatory manner; petitioners have never argued that a rule must be enforced without regard to whether it is reasonable. Although respondent argues that this is an unfair burden of proof to place on insurgents, there is really little difference than if the focus was simply on the reasonableness of the request. As the statute requires respondent to bring an action to enforce compliance with § 401(c), a burden is imposed in either instance. As all the goals of the LMRDA will be better served by giving credence to the decisions of union majority, the ad hoc interpretation is not warranted.

Respondent and his amici argue that it is unbelievable that Congress would view favorably efforts to adopt rules limiting the ability of union officials to grant requests. United States Br. 15. This argument is an exercise in semantics. While it is all well and good to say that a union should exercise its power to grant all reasonable requests and should not discriminate, the argument fails to focus on how a union can perform these duties, or the ways in which a rule will better serve the interests of

all parties concerned by preventing manipulation and by furnishing advance notice of the conditions under which requests will be granted. It takes little imagination to envision the problems that result on a practical level from measuring the reasonableness of requests in all of their dimensions.

Recognizing this fact, respondent argues that a union is entitled to adopt procedural but not substantive rules. Resp. Br. 22-23. In fact, there is no reason why a provision that regulates timing of mailings stands on any unique footing in terms of the institutional interests of the union that call for regulation of campaign requests by a rule. Certainly, many other provisions regulating mailings could have an impact upon the ability of an insurgent to mount a campaign, such as the cost of the mailing list or the selection of the mailing service. There is no reason why a timing provision should be singled out for different treatment from other regulatory provisions, other than the fact that respondent seizes on it as particularly affecting the rights of insurgents.

Respondent's argument that his construction does not undermine union self-government, because a union may still adopt rules, is a hollow gesture. As Judge Phillips stated in his dissent from the in banc decision of the Fourth Circuit:

> If a union's general rule is not unfair or arbitrary in its general application, then a candidate's request to be exempted from its requirements is obviously "unreasonable." If this is not so, then there is little reason for unions to attempt to regulate election procedures by general rules.

JA 90. Allowing the existence of a rule that may not be enforced is worse than having no rule at all.

D. The District Court Erred in Finding the Petitioners Did Not Comply With Their Duty Under Section 401(c) in Following Their Constitutional Provisions Governing the Mailing of Campaign Materials.

Respondent argues that the union constitution does not have the meaning attributed to it by petitioners, and that therefore there is no rule to be enforced. Resp. Br. 30-32. This stage of this litigation is not the place to raise this contention. This case has been argued three times previously, and no mention was made of this contention. Respondent's attempt to raise it is contrary to settled procedures governing review by this Court.

A party who prevailed below may assert grounds not decided by the lower courts insupport of the judgment. However, where the ground was not presented below, the Court exercises its authority only in exceptional cases. *Heckler v. Campbell*, 461 U.S. 458, 468-469 n. 12 (1983); *Kentucky v. Stincer*, 482 U.S. 730, 747-748 n. 22 (1987).

This is not such a case. One of the problems is that the court refused to permit petitioners to adduce evidence concerning the rule's reasonableness. This Court should not undertake to define the parameters of the union election procedure when no factual record has been made precisely because this issue was never raised.

In any event, respondent's contention is incorrect. The prohibition against mailings prior to the close of nominations is inherent in the structure of the constitutional provisions governing election procedure.[5] It is clear that under the union's election procedure, the close of the convention is the event that engages the machinery for the campaign. It is also clear that prior to this time the elements deemed necessary by the union through its constitution to effectuate mailing rights do not exist. In order to comply with the constitutional requirements regarding election procedures, therefore, the International Ballot Committee is precluded from granting mailing requests until after the close of the nominations. These provisions make clear that petitioners were complying with the express provisions of the constitution in denying respondent's request to mail out campaign literature before the designated time.

[5] The union's election procedure is much like the procedure described in Summers, American Legislation for Union Democracy, 25 Modern L. Rev. 273, 291 (1962), where the campaign period follows selection of an election committee and nominations. Respondent's argument that the campaign period is too short ignores the ninety day balloting period, during which he may make repeated mailings.

There is no contention made that the incumbent officers have placed any novel interpretation upon these provisions, or that the procedure was any different from the 1988 elections than for previous elections. If petitioners' conduct could be construed as an interpretation of the union constitution, it is still proper because the decisions of the union officials in interpreting their rules and regulations are to be accorded deference. *See Local 334 v. United Ass'n of Journeymen*, 669 F.2d 129, 130 (3d Cir. 1982); *Vestal v. Hoffa*, 451 F.2d 706 (6th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972).

Respondent makes light of the union's interest in preserving the organic whole of its election procedure. He asserts that petitioners could have effectuated the earlier mailings by sending out the campaign mailings themselves or by using the International Ballot Committee and International Ballot Agency from the previous election. Resp. Br. 38. However, this was not the procedure set forth in the union constitution, and such makeshifts give no consideration of other consequences that may result.

Respondent characterizes petitioners' argument as a contention that its rule can be struck down as unreasonable only if it is discriminatory. Certainly, whether or not a rule has discriminatory effect on union candidates

is an important fact in determining the rule's reasonableness. Here, the union provisions assure equality of treatment of union candidates and avoid any potential preferential treatment. This procedure applies to all candidates, including the union incumbents. Moreover, the rule imposes limits upon discretion of union officers in determining whether to grant requests.

There are additional union interests advanced by the operation of this union constitutional provision. First, and foremost, application of this rule assures that the voice of the union majority, as expressed in the union constitution, will be protected. By enforcing those rules chosen by the union majority, and consistently followed, the operation of the democratic process is preserved. The procedure avoids undue harassment of unions by ineligible candidates, while assuring candidates the right to be heard at or before the time that ballots are distributed and then again during the whole ninety day voting period.

Additionally, the union interest in neutrality in the operation of its election is assured by providing for the appointment of an independent balloting committee to govern the procedure for mailing out literature. While respondent makes suggestions of alternative methods for appointing such a committee two years before the election, such a selection does not take into account the difficulties in the operation of such a committee. The IOMMP is an international union whose members live around the country and whose jobs often require them to spend lengthy times away from their homes. The responsibilities of the balloting committee require members to give up several months of their time in order to meet and govern the conduct of the election. Imposing the heavy burden of this time and effort on the committee members, as well as the travel expense for the union was one that the union majority reasonably chose not to bear. The suggestion that the union have a permanent election committee in place goes beyond any possible requirement of reasonableness.

Finally, respondent suggests no alternatives to the union procedure, except no procedure at all. The problems arising from such an approach cause greater difficulties which obviously curtail the effectiveness of this method. As the union majority obviously concluded that the best method was the alternative set out in the union constitution, it is a reasonable rule.

The record in this case makes review of the full context of the union's election procedures difficult. Respondent argues, Resp. Br. 39, that petitioners are barred from complaining about this because their counsel stated at the beginning of the hearing in the district court on the motion for a temporary restraining order that "as I see it . . . the case can possibly be disposed of entirely on legal issues based on the affidavits that have been submitted." JA 65. However, counsel also stated that "insofar as there are factual conflicts, we would want the right to present evidence if they become important." JA 65. It is clear from a review of the transcript of the hearing that the only issue argued and considered at the hearing was the statutory construction of section 401(c), and whether compliance with the union constitutional procedure was sufficient to comply with that particular provision. It is also clear that the court found petitioners' proffer irrelevant and determined that no facts were essential to its decision. JA 73.

A better factual record would enhance the ultimate finding on the issue of whether the rule is reasonable. The courts have been required to ferret out crucial facts, such as the inaccuracy of respondent's initial implication that he needed preconvention mailings in order to be nominated, J.A. 8, under the pressure of expedited proceedings. Petitioners should be afforded the opportunity to develop any further facts necessary to prove the reasonableness of the rule.

CONCLUSION

For the reasons stated, it is respectfully prayed that the District Court and Court of Appeals decisions be reversed, and that this Court find that petitioner's denial of a noncomplying request to distribute literature was reasonable under 28 U.S.C. § 481(c). Alternatively, it is respectfully prayed that the Fourth Circuit decisions be reversed, and that this case be remanded for proceedings to present evidence on the issue of whether the rule is reasonable.

Respectfully submitted,

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No. 89-1330

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In the Supreme Court of the United States

OCTOBER TERM, 1990

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v.

TIMOTHY A. BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Section 401(c) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 481(c), confers a right on a candidate for union office to have campaign literature distributed by the union. The question presented is whether Section 401(c) conditions that right on the reasonableness of the request for distribution, rather than on the reasonableness of a union rule restricting such requests.

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TABLE OF AUTHORITIES

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Statutes and regulations:

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H.R. Rep. No. 741, 86th Cong., 1st Sess. (1959) 16, 20
Letter of J.L. Holcombe, Commissioner of Labor-Management Relations and Cooperative Programs, to J.W. Brown, General Counsel, Hotel & Restaurant Employees and Bartenders International Union (Apr. 20, 1960) 9, 26
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NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* (1959):
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S. Rep. No. 187, 86th Cong., 1st Sess. (1959) .. 16, 20, 21, 22, 24
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INTERNATIONAL ORGANIZATON OF MASTERS, MATES & PILOTS, ET AL., PETITIONERS

v.

TIMOTHY A. BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The Secretary of Labor enforces the provisions of Title IV of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. 481-483, governing the conduct of union elections. See 29 U.S.C. 482. This case involves interpretation of Section 401(c), 29 U.S.C. 481 (c), which confers a right on a candidate for union office to have the union distribute campaign literature at the candidate's expense. As indicated in our brief filed at the petition stage, the ability of candidates to distribute campaign literature—often the only effective method of communicating with the rank and file union membership—is an essential part of Title IV's mandate of free and open union elections. The standard governing a candidate's distribution right is therefore of central im-

portance to the statutory scheme. Because resolution of the question presented will have a significant effect on the Secretary's administration of Title IV, she has a substantial interest in this case.

STATEMENT

1. Petitioner International Organization of Masters, Mates and Pilots (the Union or IOMMP) is a labor organization representing workers employed in the maritime industry as ship's officers, as pilots, and in other similar positions. J.A. 13, 80. Petitioners Robert J. Lowen and F. Elwood Kyser are officers of the Union. J.A. 12, 80.

The Union conducts quadrennial elections of officers by mail ballot. J.A. 80. Under the Union's nominating process, a member who meets certain eligibility criteria may be nominated at the nominating convention, either by petition or from the floor. IOMMP Const. Art. V, Sec. 5, J.A. 29-30. Ballots containing the names of nominees are mailed to Union members within 30 days after the convention, and members are allowed 90 days from mailing to return their ballots. IOMMP Const. Art. V, Sec. 9(d) and (f), J.A. 38; J.A. 80.

Respondent Timothy A. Brown is a member of the Union who sought the office of president during the Union's 1988 election. J.A. 13, 76, 80. He wished to distribute campaign literature to Union members at his own expense before the August 1988 nominating convention. J.A. 15, 80. As is generally the case, the Union leadership had exclusive access to the membership mailing list, and respondent therefore asked the Union to provide mailing labels containing the names and addresses of voting Union members to a mailing service, so that he could mail literature to Union members at his own expense. J.A. 15, 80. He sought a preconvention mailing of his campaign literature in order to attract support from other members before they were likely to have committed their votes to other candidates or declared their

own candidacy. J.A. 13-14. The desirability of an early mailing is heightened in the context of this Union because most of its members work at sea for long periods of time and mail is the only effective means of communicating with them. J.A. 13. An early mailing would also increase the opportunity of Union members to confer and to discuss—for example, at the nominating convention—the issues raised in the mailing. J.A. 14, 77-78.[1]

On June 7, 1988, petitioner Kyser denied Brown's request for distribution on the ground that the Union constitution did not authorize the distribution of campaign literature until after the nominating convention, at which a ballot committee and "Impartial Balloting Agency" would be designated as responsible for such distribution. J.A. 44-45.[2] Brown appealed this decision to the Union's executive board, which denied the appeal on July 6, 1988. J.A. 48.

2. Brown then filed this action in district court, seeking a preliminary and permanent injunction directing petitioners to comply with Section 401(c) of the LMRDA. J.A. 7-11. Section 401(c) requires unions covered by the Act "to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization." Soon after Brown filed suit, the Director of the Department of Labor's Office of Elec-

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[1] In an affidavit submitted to the district court, Brown also noted that the "officers of the IOMMP control the union's newspaper, which is the principal and only regular source of news which members have about union affairs." J.A. 13; see also IOMMP Const. Art. XI, Sec. 5(b).

[2] The IOMMP Constitution does not specifically address the timing of a candidate's request for literature distribution. However, petitioners interpret several provisions of that constitution as precluding "access to the mailing list for [campaign literature] distribution until after nominations have been made," *i.e.*, after the convention. J.A. 60; see also J.A. 44-45.

tions, Trusteeships and International Union Audits, who had been furnished with copies of Brown's requests and petitioners' denials, informed the Union that the denials were contrary to the requirements of the Act. Letter from R. Hunsucker to R. Lowen (July 15, 1988).[3]

On July 25, 1988, the district court ruled that petitioners had violated Section 401(c) by refusing Brown's preconvention mailing request. J.A. 69-72, 76-78. The court therefore issued a preliminary injunction directing petitioners to deliver a set of mailing labels bearing the names and addresses of all Union members to a mutually acceptable mailing service so that Brown's campaign literature could be distributed. J.A. 74-75.

The district court held that, in determining the lawfulness of a union's refusal to honor a candidate's request to distribute campaign literature, the focus must be on the reasonableness of the request rather than on the reasonableness of the union rule under which the request was denied. J.A. 76-77. The court found this result mandated by the clear language of the statute, which requires a union "to comply with all reasonable requests of any candidate." *Ibid.* (quoting Section 401(c)). In the district court's view, a court could not give effect to a union rule if "its application results in the rejection of a reasonable request made by a candidate." J.A. 77. In this case, since Brown's request "to

[3] Mr. Hunsucker also wrote to respondent informing him that the Department viewed the Union's denial of his request as unlawful. See Letter of R. Hunsucker to T. Brown (July 15, 1988), J.A. 52-54. Mr. Hunsucker's letter stated that candidates for union office must be afforded a reasonable period to campaign and that what constitutes a reasonable period is dependent upon a number of factors "including the method of nomination, the size of the union, and the geographic area in which it operates." J.A. 53. He noted that "[m]aritime unions generally require more time for this purpose than do land-based organizations of limited geographic jurisdiction," and concluded that "[a] request for a mailing to be made approximately one month prior to nominations would appear to be reasonable." J.A. 53-54.

distribute his campaign literature approximately one month before the union's convention is held * * * is clearly reasonable," the court concluded that petitioners had violated the Act by refusing to honor it. *Ibid.*[4]

3. A divided panel of the court of appeals affirmed the preliminary injunction on the ground that Brown's request was a reasonable one. J.A. 79-88.[5] The majority agreed with the district court that Section 401(c) conditions a candidate's distribution right solely on the reasonableness of the request, not on the reasonableness of any union rule. J.A. 81. "[M]aking the issue the reasonableness of the union by-law," the court noted, "stands the statute on its head" by "render[ing] union by-laws superior to the congressional mandate and [by] provid[ing] dissident unions with a ready means for nullifying the statute's command." J.A. 85. In addition, the majority observed that its reading accorded with the construction of the statute adopted by the Secretary of Labor, whose "opinion [is] entitled to consideration by this Court and is not to be lightly disregarded." J.A. 82. The court also found the Secretary's construction to be "in clear accord" with Congress's intent to ensure union democracy by moderating the advantages of incumbents who have "exclusive control of the union membership lists" between elections. J.A. 82-83.

Noting that the Union had made no claim that Brown's request was unreasonable, the majority held that the "manifest result" of denying that request pursuant to the Union's rule would be to favor incumbents. J.A. 83. The court noted that the incumbents had had four years

[4] The court ruled in the alternative that even if the reasonableness of a union's rule governs the LMRDA inquiry, petitioners had violated the Act because the Union rule invoked in this case was unreasonable. J.A. 77-78.

[5] The district court had entered a preliminary injunction, but the court of appeals, after noting that the district court's opinion and order "in effect constituted a decision on the merits," "affirm[ed] the decision * * * as one on the merits." J.A. 80.

to communicate with Union members and "to cultivate their relations with the local union officers who would be expected to have the greatest influence with the rank and file"; it also noted that during this time the incumbents had control of the Union press and its newsletter to the members. *Ibid.* In these circumstances, the court concluded, "[t]he advantages of the union by-law to the incumbent cannot be questioned." *Ibid.*

The majority in turn rejected the Union's argument that the use of its rule was permissible because it was a reasonable method of satisfying the Act's prohibition against discrimination among candidates with respect to campaign literature distribution. J.A. 84. As the court reasoned, granting Brown's request would not constitute discrimination because any other candidate for office could assert the same right. Rather, granting the request would "reduce[] the discrimination of exclusive control by the union incumbents over the electoral lists." *Ibid.*

Judge Hall, in dissent, concluded that any individual request for distribution that conflicts with established union procedures is per se unreasonable unless the union's procedures are shown to be unfair or discriminatory. J.A. 86. He asserted that the majority's approach prevented a request for distribution from being examined within its "underlying factual context." J.A. 87. In addition, he faulted the majority's approach as sanctioning judicial intrusion into internal union affairs, absent an indication that the union had distorted the democratic process. *Ibid.*

The Fourth Circuit granted petitioners' suggestion for rehearing en banc; although the Secretary had not participated at earlier stages of the litigation, she filed a brief as amicus curiae supporting respondent and participated in oral argument before the en banc court. The full court adopted the panel majority's opinion affirming the Secretary's interpretation of Section 401(c). J.A. 90. Judge Hall adhered to his earlier dissent, and Judge Phillips filed a separate dissenting opinion in which he supported Judge Hall's views. J.A. 90-91.[6]

SUMMARY OF ARGUMENT

The court of appeals correctly held that Section 401(c) of the LMRDA conditions the distribution right of candidates for union office on the reasonableness of their requests for distribution, rather than on the reasonableness of any union rule restricting their requests. This approach is dictated by the language, structure, and legislative history of the Act; it best implements the purposes of the statute; and it accords with the interpretation adopted by the Secretary of Labor.

1. The plain terms of Section 401(c) require every union "to comply with all reasonable requests of any candidate to distribute" campaign literature; the Section thereby makes dispositive the reasonableness of a candidate's request. The meaning of the provision is as deliberate as it is clear: when Congress wished to make union members' rights subject to restriction by union rules, it did so explicitly. See, *e.g.*, Section 101(a)(1), 29 U.S.C. 411(a)(1); Section 101(a)(2), 29 U.S.C. 411(a)(2).

There is no support for petitioners' argument that, since rules by their nature limit official discretion, any

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[6] On July 28, 1988, the day it heard oral argument, the panel issued an order denying petitioners' application for a stay of the preliminary injunction; petitioners thereafter complied with Brown's distribution request. The Union subsequently conducted its election and Brown lost the election by a small margin. However, the propriety of that election was successfully challenged by the Secretary on a number of other grounds, and a new election will be held. *Dole* v. *International Organization of Masters*, No. MJG-89-2071 (D. Md.). Brown has already sought to exercise his right to have campaign literature distributed in the new election and may seek to do so in the next regularly scheduled election. Br. in Opp. 7 n.1. We therefore agree with the parties that, because the controversy is capable of repetition yet evading review, this Court has jurisdiction to consider this matter. See *ibid.*

right that is subject to case-by-case review—as is the right provided by Section 401(c)—is also subject to the "lesser restraint" of union rules. First, the argument neglects the role of the court: the alternative to limitation of candidate rights by union rule is *not* the uncontrolled discretion of union officials but a determination of the reasonableness of a request that is subject to judicial review. Second, this Court has already decided that the provisos making rights subject to reasonable union rules were added in order to preserve unions' prerogatives to impose such union rules; where Congress did not include such a proviso, it did not intend the right at issue to be so qualified. Finally, it is highly unlikely that Congress intended to allow union rules to restrict union officials' ability to *grant* reasonable requests. Nor is there any danger that officials will discriminate in granting requests, since such discrimination is expressly prohibited by Section 401(c).

The structure of the statute also supports the court of appeals' reading of Section 401(c). That Section's requirement is the only obligation imposed under Title IV of the LMRDA that is enforceable through private suit as well as through civil action by the Secretary. The dual enforcement mechanism underscores the desire of Congress to limit union prerogatives in favor of the basic right of union members to have campaign literature distributed.

2. This interpretation of Section 401(c) best advances the purpose of the Act to safeguard free and democratic union elections: it promotes maximum communication between insurgent candidates and the union electorate, an essential goal since voters are already familiar with the leadership of incumbents through official channels. In fact, stringent enforcement of the right guaranteed by Section 401(c) will itself minimize the need for governmental interference with internal union affairs, since individual members will then be able to police union processes themselves. Finally, it is unlikely that candidates

will overwhelm their union with distribution requests, since the candidates must bear the costs of the distribution themselves.

Additional legislative history confirms that Congress acted deliberately when it declined to make the distribution right subject to union rules. While Congress repeatedly referred to the unions' duty to grant "all reasonable requests," there is no indication whatever in the legislative materials that a limitation by union-made rules may be appropriate. Further, Congress adopted the key language of Section 401(c) contemporaneously with its addition of provisos making other rights in the LMRDA subject to union rules. Clearly Congress judged such a qualification to be inappropriate in the context of the right to request literature distribution.

3. The Secretary of Labor has consistently interpreted Section 401(c) to require that unions must grant "all reasonable [distribution] requests," whether or not a union has passed reasonable rules that dictate otherwise. Were there any ambiguity in the statutory mandate, the Secretary's interpretation would be entitled to deference.

The Secretary has early and repeatedly confirmed this interpretation by opinion letter (see Letter of J.L. Holcombe, Commissioner of Labor-Management Relations and Cooperative Programs, to J.W. Brown, General Counsel, Hotel & Restaurant Employees and Bartenders International Union (Apr. 20, 1960)), by regulation (see, *e.g.*, 29 C.F.R. 452.67; 29 C.F.R. 452.69), and in litigation positions (see, *e.g.*, *Donovan* v. *Metropolitan District Council of Carpenters*, 797 F.2d 140 (3d Cir. 1986)). These statements are not inconsistent with the Secretary's encouragement of union rules regarding distribution of literature. See 29 C.F.R. 452.67. Indeed, through rules, a union can notify its members as to the mechanics of distribution and can apprise them of administrative constraints facing the union (which may in fact influence whether a request is "reasonable"). An

acknowledgement that rules offer these advantages has not altered the Secretary's recognition that a court applying Section 401(c) must look to the reasonableness of a candidate's request rather than the reasonableness of a union rule.

ARGUMENT

A CANDIDATE'S RIGHT UNDER THE LMRDA TO HAVE CAMPAIGN LITERATURE DISTRIBUTED BY THE UNION IS CONDITIONED ON THE REASONABLENESS OF THE REQUEST FOR DISTRIBUTION, NOT ON THE REASONABLENESS OF A UNION RULE RESTRICTING SUCH REQUESTS

Section 401(c) of the LMRDA provides that a labor organization has a duty to comply with "all reasonable requests" by candidates for union office to distribute their campaign literature to all members of the union in good standing. The court of appeals correctly held that in determining whether a union's refusal to comply with a candidate's request offends this provision, a court should assess the reasonableness of the candidate's request, rather than the reasonableness of the union rule under which the request was denied. J.A. 81, 84.

Under this interpretation, a reviewing court must determine whether there has been a violation of the distribution requirement by evaluating all the facts and circumstances attendant to the request (and its denial), rather than by giving deference to union rulemaking. Thus, the reasonableness of a candidate's request will be judged in light of such factors as the geographic distribution of the union, the size of the union membership, the type of election held by the union (direct referendum or delegate), and the timing of the candidate's request. Indeed, a reviewing court's attention to the factual context of a request naturally includes its consideration of existing union rules as evidence of administrative constraints and concerns faced by the union.[7] Cf. 29 C.F.R. 452.79; *Local 3489, United Steelworkers* v. *Usery*, 429 U.S. 305, 313 (1977).[8] There is no warrant in the statute, however, to elevate a union rule beyond this evidentiary function and give it dispositive weight.

This approach adheres to the language and legislative history of the provision, best implements the purposes of the statute, and accords with the interpretation of the Secretary of Labor, who is charged with the enforcement of Title IV.

A. The Language and Structure of Section 401(c) Require Courts to Focus On The Reasonableness Of The Candidate's Request

1. The court of appeals' conclusion is directed by the text of Section 401(c). That Section provides in relevant part (emphasis added):

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[7] For example, before computerized record-keeping, unions commonly kept the names and addresses of members on ledger cards. The cards were pulled and used in order to mail out ballots. A union rule prohibiting the mailing of campaign literature during the week the cards were being used to mail election ballots would accurately reflect administrative constraints faced by the union and so provide strong evidence that a candidate's demand for a mailing at that time was unreasonable.

[8] Thus, petitioners and amicus AFL-CIO repeatedly overstate the matter—and misstate the position of the United States (see U.S. Br. at petition stage 15 n.8)—when they contend that the approach adopted by the Fourth Circuit requires a court to "ignore" union rules (AFL-CIO Br. 5) and decide cases "without reference" (*id.* at 7) to them. See, *e.g.*, Pet. Br. i, 9, 12, 15, 24; AFL-CIO Br. 9-10, 16.

Likewise, no purpose is served by amicus's reformulation of the issue as "whether—given the factual context of preexisting and reasonable union rules—a candidate's request is 'reasonable' when the request fails to conform to the rules' requirements." AFL-CIO Br. 10, 15. This reformulation still requires assessment of the "reasonableness" of a union's rules—whether by assuming that they are reasonable (as petitioners and their amicus evidently do in this case) or by concluding that they are reasonable after a fact-specific evaluation. The question remains whether that assessment should prevail over an evaluation of the reasonableness of a request.

> Every national or international labor organization, * * * and every local labor organization, and its officers, *shall be under a duty*, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, *to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy* to all members in good standing of such labor organization * * *.

Section 401(c) thus imposes an obligation on unions to distribute campaign literature at a candidate's expense in response to "all reasonable requests of any candidate."[9] The meaning of the provision is clear: it "conditions the right of the contesting union office seeker to have his campaign material distributed only on the *reasonableness of his request.*" J.A. 81 (emphasis added).

Congress's choice of language was deliberate. When Congress wanted the courts to focus instead on the reasonableness of union rules, it said so explicitly. Elsewhere in the LMRDA, Congress identified the specific circumstances in which it intended reasonable union rules to qualify a union member's rights. See, *e.g.*, Section 401(e), 29 U.S.C. 481(e) ("every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed)"); Section 101(a)(1), 29 U.S.C. 411(a)(1) (providing union members with equal rights and privileges to nominate candidates, to vote in elections or referendums, to attend union meetings and to participate in deliberations and voting at such meetings, "subject to reasonable rules and regulations in [a labor organization's] constitution and bylaws"); Section 101(a)(2), 29 U.S.C. 411(a)(2) (providing union members with rights to free speech and assembly "subject to the organization's established and reasonable rules pertaining to the conduct of meetings"). The difference in language between these provisions and Section 401(c) is hardly a "subtle" one (AFL-CIO Br. 18): each of the other provisions subjects an individual's right to limitation by "reasonable rules" or "qualifications"; Section 401(c) does not. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987); see also *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 109 (1980). That proposition is fully applicable here.

[9] A union member need not be formally nominated in order to be a bona fide candidate entitled to exercise Section 401(c) rights. 29 C.F.R. 452.80; see *Yablonski* v. *UMW*, 71 L.R.R.M. (BNA) 2606 (D.D.C. 1969).

Nor can the import of the language difference be inverted, as petitioners (Br. 11, 16) and their amicus (AFL-CIO Br. 6, 16-17) seek to do, by asserting that the right in Section 401(c) is *less expansive* than those rights explicitly made subject to reasonable union rules. Under their argument, since a rule by its nature limits discretion, any right that is subject to case-by-case review—as is the right to distribution under Section 401(c)—may also be subject to what they view as the lesser restraint of union rules. Pet. Br. 11-12, 16; AFL-CIO Br. 16-17, 20. Thus, they contend that a union may respond to distribution requests *either* by ad hoc decision-making or by applying union rules.

This argument should be rejected for three reasons. First, under Section 401(c), the alternative to limitation of candidate rights by union rule is *not* the uncontrolled discretion of union officials. Rather, the statute expressly provides that a union's rejection of a request is subject to judicial review in order to determine whether the request was reasonable and should have been granted. Thus the statute requires the court to review *de novo* the final conclusion reached by a union; it does not allow a court to

defer to the union by examining only the rules it used to reach that conclusion.

Second, this Court has already determined that those provisions making rights of union members subject to union rules carry their natural meaning: Congress added that qualification in order to "preserve[] the union's right to adopt reasonable rules." *United Steelworkers* v. *Sadlowski*, 457 U.S. 102, 110 (1982). It attached the qualification to statements that, as originally proposed, appeared to bestow rights on union members more expansively than Congress wished and left unions themselves vulnerable to harassment. *Id.* at 110-111.[10] By contrast, where Congress did not provide that rights would be limited by union rules, those rights are properly read as carrying more expansive protection for union members.[11]

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[10] The predecessors of Section 101(a)(1), 29 U.S.C. 411(a)(1) (pertaining to equal rights), and Section 101(a)(2), 29 U.S.C. 411(a)(2) (pertaining to free speech and association) were added to the LMRDA on the floor by Senator McClellan as part of a "Bill of Rights" for union members. See 105 Cong. Rec. 6469-6493 (1959), *reprinted in* 2 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 1096-1119 (1959) [hereinafter *Leg. Hist.*]. Three days later, the Senate adopted substitute language for the McClellan amendment, including for the first time the proviso that subjected the new rights in Sections 101(a)(1) and (2) to "reasonable rules" imposed by a union. See 105 Cong. Rec. 6693 (1959), 2 *Leg. Hist.* 1220; 105 Cong. 6727 (1959), 2 *Leg. Hist.* 1239. The purpose of the proviso was "to remove 'the extremes raised by the [McClellan] amendment'" and to moderate language that was "too broad" by allowing "reasonable restraints." *Sadlowski*, 457 U.S. at 110; 105 Cong. Rec. 6719 (1959), 2 *Leg. Hist.* 1231 (statement of Sen. Kuchel (sponsor)). See note 21, *infra*.

[11] It is thus inappropriate for petitioners and amicus to enlist case law identifying the deference due unions under provisions directing judicial attention to union rules (*e.g.*, Sections 101(a)(1) and (a)(2), 401(e)) to support conclusions concerning the text of Section 401(c). See, *e.g.*, Pet. Br. 17 n.4 (citing *Local 3489*, 429 U.S. at 312-313; *Sadlowski*, 457 U.S. at 117); AFL-CIO Br. 10-11, 17-18 (citing *Wirtz* v. *Hotel Employees Union, Local 6*, 391 U.S. 492, 496 (1968); *Sadlowski*, 457 U.S. at 111-112, 117).

Third, it makes no sense to believe, as petitioners' argument assumes, that Congress would view favorably efforts to adopt rules limiting the ability of union officials to *grant* a candidate's reasonable requests. Nor can a union grant only some reasonable requests. To the contrary, Section 401(c) provides that unions must respond to "all reasonable requests" and also contains a provision explicitly prohibiting discrimination regarding requests. See also 29 C.F.R. 452.67. Indeed, the prohibition against discrimination even protects a union member from favoritism that takes the form of selectively granting *unreasonable* requests. As the court of appeals stated, "[t]here is no conceivable way in which the granting of [respondent's] request will work a discrimination against any other union member" because "any candidate, whether an incumbent or an insurgent, has the same rights as the [respondent]." J.A. 84.[12]

2. The structure of the statute likewise supports the court of appeals' reading of Section 401(c). Section 401(c)'s requirement is the only obligation imposed under Title IV that is enforceable by private suit as well as through actions brought by the Secretary.[13] Thus, can-

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[12] The nature of the right at issue—a right to publicity—also negates any significant danger that members will have difficulty monitoring a union's action in granting requests and minimizes the danger that a union will act inconsistently. See AFL-CIO Br. 8. Of course, if a union is truly concerned that a necessary departure from a union rule to accommodate a reasonable request would discriminate against other candidates who are unaware of their rights under the statute, the union can publicize the granting of the request.

[13] The insertion of a private right of action to enforce the distribution right came as part of the compromise struck to amend the McClellan Bill of Rights. See note 10, *supra*. The version of the LMRDA reported out of conference had provided that a union was required to comply with "all reasonable requests" for distribution and had prohibited discriminatory treatment of candidates; enforcement was left to the Secretary. S. 1555, 86th Cong., 1st Sess. § 301(b) (1959), 1 *Leg. Hist.* 372. The McClellan Bill of Rights gave individual members the additional right of inspecting

didates seeking to bring a private action need not exhaust internal union remedies, or await the completion of the election (or the failure to hold an election within the statutorily prescribed time), before seeking relief. Compare 29 U.S.C. 482, 483; see *Local No. 82, Furniture & Piano Moving* v. *Crowley*, 467 U.S. 526, 539-540 & n.15 (1984); *Dunlop* v. *Bachowski*, 421 U.S. 560, 566-567 (1975). The other obligations imposed by Title IV, which the Secretary of Labor enforces by civil action, are subject to such requirements in order to assure unions a "maximum amount of independence and self-government" by giving them every opportunity to correct their errors. S. Rep. No. 187, 86th Cong., 1st Sess. 21 (1959); *Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 472-473 (1968). By contrast, Section 401(c), in its dual enforcement mechanism as in its terms, sharply limits union prerogatives in favor of the rights of individual union members.

A structural argument advanced by amicus (AFL-CIO Br. 13, 23)—that the holding below is inconsistent with the requirement of Section 401(e) that unions conduct elections in accordance with their constitutions and

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and copying the membership list but did not change enforcement by the Secretary. Secs. 101(a)(7) and 103, 105 Cong. Rec. 6476 (1959), 2 *Leg. Hist.* 1102. Senators concerned that dissemination of a union's membership list could be abused succeeded in removing the inspection and copying right. See, *e.g.*, 105 Cong. Rec. 6717 (1959), 2 *Leg. Hist.* 1230 (statement of Sen. Kuchel); *id.* at 6728, 2 *Leg. Hist.* 1240 (statement of Sen. Javits); see also H.R. Rep. No. 741, 86th Cong., 1st Sess. 86 (1959). In return, they offered language providing that an individual member "may go into the Federal court and may have his rights [not to be discriminated against] under the language of the bill adjudicated." 105 Cong. Rec. 6717 (1959); 2 *Leg. Hist.* 1230 (statement of Senator Kuchel, explaining provision to be introduced by Senator Javits). See also 105 Cong. Rec. 6720 (1959), 2 *Leg. Hist.* 1232 (statement of Sen. Kuchel) (explaining that private right of action was added to enforce other Bill of Rights provisions because it was "in the interest of justice"); 105 Cong. Rec. 6723 (1959), 2 *Leg. Hist.* 1235 (statement of Sen. Curtis) (similar).

bylaws—is without merit. Section 401(e) stipulates that unions are to follow constitutional provisions or bylaws only "insofar as they are not inconsistent with the provisions of this title." Thus Section 401(e) demonstrates Congress's intention that rules embodied in union constitutions and bylaws, like other union rules, are limited by the basic standards that Congress deemed critical to union democracy. Those standards include the right established in Section 401(c).[14]

B. The Purpose and Legislative History of Section 401(c) Support The Conclusion That The Appropriate Focus Is On The Reasonableness Of The Candidate's Request

1. The court of appeals' straightforward reading of the statute best implements the provision's purpose. "The LMRDA was 'the product of congressional concern with widespread abuses of power by union leadership.'" *Crowley*, 467 U.S. at 536 (quoting *Finnegan* v. *Leu*, 456 U.S. 431, 435 (1982)). Specifically, "abuses [that] surfaced [during] the extensive congressional inquiry [pre-

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[14] Petitioners' amicus contends (AFL-CIO Br. 22-23) that the fit between Sections 401(c) and 401(e) nevertheless puts a union in "an intolerable legal position": A union that denies a candidate's distribution request may be sued under Section 401(c); a union that grants the request may be sued under Section 401(e) on behalf of another candidate who points to a contrary union constitutional provision or bylaw, contends that the distribution request was unreasonable, and asserts that the union deviated from the provision or bylaw without justification.

The hypothetical is an imagined dilemma, not a real world one. Only the Secretary can act against a Section 401(e) violation—by exercising her authority under Section 402 of the Act, 29 U.S.C. 482, to overturn the election. It is highly unlikely that the Secretary would conclude that an action to overturn an election should be brought because a request voluntarily granted by the union violated a constitutional provision and was unreasonable and the grant may have affected the outcome. In any case, as we have noted (see note 12, *supra*), a union can lessen the possibility that any candidate would protest discriminatory treatment by publicizing the decision to honor a distribution request.

ceding enactment of the statute] show[ed] how incumbents' use of their inherent advantage over potential rank and file challengers established and perpetuated dynastic control of some unions." *Glass Bottle Blowers Ass'n*, 389 U.S. at 474. Faced with revelations of union corruption, dictatorial practices, and racketeering, Congress determined "to protect the rights of rank-and-file members to participate fully in the operation of their union through processes of democratic self-government, and, through the election process, to keep the union leadership responsive to the membership." *Wirtz* v. *Hotel Employees Union, Local 6*, 391 U.S. 492, 497 (1968). It designed Title IV with the basic objective of "guarantee-[ing] 'free and democratic' union elections modeled on 'political elections in this country.'" *Local 3489*, 429 U.S. at 309 (quoting *Hotel Employees*, 391 U.S. at 504); see also *Glass Bottle Blowers Ass'n*, 389 U.S. at 470; *id.* at 475 (Act designed to protect "vital public interest" in free and democratic union elections).

The ability of a candidate to communicate with union members through distribution of campaign literature is central to a free and democratic election process. Only if a candidate can speak to the rank and file effectively will union members be able to make the informed choice that Congress viewed as critical to union democracy. It is therefore not surprising that the provision enacted as Section 401(c) came to the floor as part of the package designed as a "Bill of Rights" for union members.[15] Congress's emphasis in Section 401(c) was to provide safeguards that could not be moderated or evaded by those in positions of power in the union.

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[15] The package was suggested by Senators Kuchel and Javits as an alternative to Senator McClellan's "Bill of Rights." See 105 Cong. Rec. 6717 (1959), 2 *Leg. Hist.* 1229-1230 (statement of Sen. Kuchel); 105 Cong. Rec. 6726 (1959), 2 *Leg. Hist.* 1238 (statement of Sen. Javits); 105 Cong. Rec. 6728 (1959), 2 *Leg. Hist.* 1240 (statement of Sen. Javits); 105 Cong. Rec. 6729 (1959), 2 *Leg. Hist.* 1242 (statement of Sen. Clark).

Moreover, in enacting Section 401(c), Congress specifically recognized that challengers were at a severe disadvantage vis-a-vis incumbents who had long had access to union membership lists and had for years been able to communicate with union members on a regular basis through official union channels.[16] See generally Summers, *Democracy in a One-Party State: Perspectives from Landrum-Griffin*, 43 Md. L. Rev. 93, 97-98 (1984) (a major "source and instrument of oligarchic control [in unions] is domination of the channels of communication" by incumbents); *id.* at 105, 117-118. Giving full effect to Section 401(c)'s broad mandate requiring unions to honor "all reasonable requests" implements Congress's purpose by promoting maximum communication between all candidates and the union electorate.

By contrast, the standard advocated by petitioners—allowing denials of distribution requests on the basis of "reasonable" union rules—meets none of these congressional concerns. The proposed standard by its very terms defers to existing union rules. These rules are not written on a blank slate; they are instead restrictions on the use of union channels of communication in a context where incumbents have generally enjoyed control of those channels. See, *e.g.*, Summers, *supra*, at 108-109, 113. Moreover, rules may be found reasonable if they further legitimate union interests while serving the needs of most candidates—despite the fact that the needs of the remaining candidates may go unmet, or that a better rule could easily be devised. Thus, to focus on the reasonableness of rules rather than of requests is not so much to reduce incumbents' control (see Pet. Br. 8, 15, 16; AFL-

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[16] See, *e.g.*, colloquy between Senators McClellan and Javits, 105 Cong. Rec. 6728 (1959), 2 *Leg. Hist.* 1240 (Senator McClellan voices concern about power of "incumbent officers" who are "able to perpetuate themselves in office" by use of membership lists; Senator Javits assures him that amendment containing the langage substantially enacted as Section 401(c) will be effective because of amendment's clause prohibiting discrimination in access to lists).

CIO Br. 12, 20-21) as to constrict the initiative Congress intended to guarantee all insurgent candidates.

Nor can Congress's care to avoid unnecessary intrusion into union affairs be employed to revise the purpose of the LMRDA. See Pet. Br. 14-16; AFL-CIO Br. 17-18. Congress clearly recognized that "[a] strong independent labor movement is a vital part of American institutions." S. Rep. No. 187, *supra*, at 5. But the LMRDA was not enacted to protect union autonomy. The statute was passed to implement Congress's determination that "effective measures to stamp out crime and corruption and guarantee internal union democracy, cannot be applied to all unions without the coercive powers of government." S. Rep. No. 187, *supra*, at 6; H.R. Rep. No. 741, 86th Cong., 1st Sess. 6 (1959).[17]

In fact, Congress determined that establishing certain critical protections for individual union members would itself minimize governmental interference in union affairs. "Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs." S. Rep. No. 187, *supra*, at 7; see also *id.* at 19-21; H.R. Rep. No. 741, *supra*, at 15-16. While this theme is reflected in Title I, the "Bill of Rights" for union members, "Title IV, and particularly § 401, was the vehicle by which Congress expressed its policy." *Hotel Employees*, 391 U.S. at 497-498. As this Court put it,

[17] See also S. Rep. No. 187, *supra*, at 20; *Trbovich* v. *UMW*, 404 U.S. 528, 530-531 (1972) ("The LMRDA was the first major attempt of Congress to regulate the internal affairs of labor unions. Having conferred substantial power on labor organizations, Congress began to be concerned about the danger that union leaders would abuse that power, to the detriment of the rank-and-file members.") (footnote omitted); *Finnegan*, 456 U.S. at 441 ("[T]he Act's overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections."); *Crowley*, 467 U.S. at 536; *Hotel Employees*, 391 U.S. at 497; *Glass Bottle Blowers Ass'n*, 389 U.S. at 469-470.

> Congress did not saddle the courts with the duty to search out and remove improperly entrenched union leaderships[.] Rather, Congress chose to guarantee union democracy by regulating not the results of a union's electoral procedure but the procedure itself. Congress decided that if the elections are "free and democratic," the members themselves are able to correct abuse of power by entrenched leadership.

Local 3489, 429 U.S. at 311-312. In short, it was Congress's judgment that the federal interest in avoiding undue intervention into internal union matters is furthered by stringent enforcement of such basic membership rights as the right to distribute campaign literature. See also *Glass Bottle Blowers Ass'n*, 389 U.S. at 471 ("[T]he freedom allowed unions to run their own elections was reserved for those elections which conform to the democratic principles written into § 401."); accord *Hotel Employees*, 391 U.S. at 496-497.[18]

There is no support for petitioners' speculation (see Pet. Br. 24) that the safeguard dictated by Section 401 (c) places an unreasonable burden on unions. Under Section 401(c), a candidate bears the costs of each requested distribution. Unions are thus freed from any monetary burden, and it is unlikely that candidates bearing the expenses of preparing and mailing campaign literature will make requests "continuously" or "at any time during the four year period between elections" (Pet.

[18] As petitioners' amicus points out (AFL-CIO Br. 10 n.5), Congress's desire to avoid unnecessary intervention into union affairs stimulated it to impose "only essential standards" and "minimum democratic safeguards" in the Act. S. Rep. No. 187, *supra*, at 7; see *Sadlowski*, 457 U.S. at 117. The protections that appear in the LMRDA thus represent the least that is necessary, in Congress's view, to attain the objectives of the Act; they should not be recalibrated. "The legislative history shows that Congress weighed how best to legislate against revealed abuses in union elections without departing needlessly from its long-standing policy against unnecessary governmental intrusion into internal union affairs." *Glass Bottle Blowers Ass'n*, 389 U.S. at 470-471; accord *Hotel Employees*, 391 U.S. at 496-497.

Br. 24). (In any case, a union must grant only such requests as are reasonable.) Nor does the administrative machinery required to deal with candidates' requests appear overwhelming. Indeed, in this case, only two changes seem necessary. The Union would need to designate a mailing service before the convention—which it has already done to distribute other literature. See J.A. 61. And the Union may wish to verify a candidate's eligibility before authorizing the mailing. But verifying length of membership, good standing, and certain service requirements (see IOMMP Const. Art. V, Sec. 4, J.A. 26-29) scarcely seems inordinately burdensome.[19]

2. Additional legislative history confirms the court of appeals' interpretation of Section 401(c). In its explanations of that Section, Congress repeatedly referred to the duty of unions to comply with the "reasonable requests" of candidates. See S. Rep. No. 187, *supra*, at 46 ("Local unions and their officers are forbidden to discriminate in favor of or against any candidate for union office with respect to the use of the union's list of members in good standing and are required to comply with *all reasonable requests of any candidate* for distribution of his campaign literature by the unions, but at the candidate's expense, to members in good standing on the union's roster of members.") (emphasis added)[20]; H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 33 (1959) ("Subsection (b) of section 401 of the Senate bill [adopted by the Conference Committee] contains a provision making it the duty of each union and its officers to comply with *reasonable requests of candidates* to distribute, at the candidates'

[19] Though petitioners and their amicus emphasize that the value of a rule includes the assurance of both clarity and notification (Pet. Br. 23-24, 26-27, AFL-CIO Br. 7, 9, 12), no such rule exists in this case. The "rule" petitioners rely on here is only an interpretation of ambiguous provisions of the Union's constitution. See note 2, *supra*.

[20] S. Rep. No. 187, *supra*, at 46 reviewed language requiring unions to comply with "all reasonable [distribution] requests" similar to that ultimately adopted. See note 13, *supra*.

expense, campaign literature to all members of the union.") (emphasis added).

Neither in these explanations nor in comments during the floor debates was reference ever made to a union prerogative to limit requests according to union rules. Yet, Congress was fully aware of the possibility of such a limitation. As noted above (p. 18 & note 15), the language substantially enacted as Section 401(c) came to the floor as part of a "Bill of Rights" for union members. The initial version of the Bill of Rights, sponsored by Senator McClellan, was modified by an amendment offered by Senator Kuchel. See p. 14 & note 10, *supra*. The Kuchel amendment qualified certain rights provided under the McClellan version by, *inter alia*, expressly permitting unions to adopt reasonable rules—an alteration extensively discussed on the floor.[21] The Javits amendment creating Section 401(c) was drafted in conjunction with the Kuchel amendment and was offered on the floor immediately after the latter's passage. See note 15, *supra*. Although the Kuchel amendment to Title I expressly referred to reasonable union rules and procedures, the Javits amendment did not. Given this context, there is little question that this omission in the Javits amendment was deliberate.[22]

[21] See, *e.g.*, 105 Cong. Rec. 6719 (1959), 2 *Leg. Hist.* 1231-1232 (statements of Sen. Kuchel); 105 Cong. Rec. 6721 (1959), 2 *Leg. Hist.* 1233 (statement of Sen. Church); 105 Cong. Rec. 6721-6722 (1959), 2 *Leg. Hist.* 1234 (statement of Sen. Lausche); 105 Cong. Rec. 6722-6724 (1959), 2 *Leg. Hist.* 1235-1236 (statements of Sen. Goldwater); 105 Cong. Rec. 6723 (1959), 2 *Leg. Hist.* 1236 (statement of Sen. Allott); 105 Cong. Rec. 6724 (1959), 2 *Leg. Hist.* 1236 (statement of Sen. Clark) (all debating whether McClellan Bill of Rights had been unduly weakened or appropriately moderated).

[22] Indeed, as explained above (see note 13, *supra*), the Javits amendment was apparently motivated by a concern about a provision in the McClellan Bill of Rights granting candidates the right to inspect and copy membership lists. (In return for the deletion of that right, the Javits amendment added a private en-

Finally, this Court has rejected giving a "broad reach" even to those provisions of Title IV, such as Section 401(e), that explicitly cede authority to union rulemaking. *Local 3489*, 429 U.S. at 309; *Hotel Employees*, 391 U.S. at 499. *A fortiori*, it is not proper to stretch the language of Section 401(c) to imply such authority.

C. The Secretary's Construction Of Section 401(c) Is Entitled To Deference

The Secretary of Labor has authority to enforce the provisions of Title IV (*Crowley*, 467 U.S. at 539 n.14), including Section 401(c). As the court below noted (J.A. 82), she and her predecessors have consistently interpreted the statute as requiring unions to comply with all reasonable requests for distribution. Indeed, in this case, the Director of the Office of Elections, Trusteeships and International Union Audits of the Department of Labor advised petitioners by letter that the Union's denial of respondent's request appeared to be unlawful. See pp. 3-4 & note 3, *supra*; J.A. 52-54.

This Court has consistently recognized the "special knowledge and discretion" of the Secretary in the administration of Title IV. *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964); see *Local 3489*, 429 U.S. at 313; *Glass Bottle Blowers Ass'n*, 389 U.S. at 473; see also S. Rep. No. 187, *supra*, at 34 (noting that the LMRDA "endows the Secretary of Labor with broad power to insure ef-

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forcement remedy to the right to request distribution (*ibid.*) and enhanced the existing prohibition against discrimination in union distributions of literature. Compare S. 1555, 86th Cong., 1st Sess. § 301(b) (1959), 1 *Leg. Hist.* 372, with Javits amendment, 105 Cong. Rec. 6727-6728 (1959), 2 *Leg. Hist.* 1240.) Thus, the amendment was fashioned only to protect against the dangers of *disclosure* of membership lists; it was not intended otherwise to restrict the rights of union candidates to obtain the unlimited use of such lists. (At conference, a House provision granting candidates the right to inspect a membership list once within 30 days of the election was added to Section 401(c). H.R. Conf. Rep. No. 1147, *supra*, at 34.)

fectuation of its objectives"). The court of appeals was therefore correct in concluding that the Secretary's view is entitled to deference. See, *e.g.*, *Donovan* v. *National Transient Division, Int'l Bhd. of Boilermakers*, 736 F.2d 618, 621 (10th Cir. 1984) (deference is owed to Secretary's LMRDA interpretation "unless there are compelling indications that it is wrong"), cert. denied, 469 U.S. 1107 (1985); accord *BLE Int'l Reform Comm.* v. *Sytsma*, 802 F.2d 180, 188 (6th Cir. 1986); see also *e.g.*, *Donovan* v. *Sailors' Union*, 739 F.2d 1426, 1429 (9th Cir. 1984), cert. denied, 471 U.S. 1004 (1985). While we believe the language of the LMRDA is dispositive, the Secretary's interpretation is, at the very least, "based on a permissible construction of the statute" and should be given effect. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).[23]

Petitioners and their amicus do not dispute that the Secretary's interpretation of an ambiguous LMRDA statutory provision is entitled to deference. Their more limited contention (Pet. Br. 20-22; AFL-CIO Br. 23 n.12)—that the Secretary has not spoken clearly to the question presented by this case—is mistaken.

Shortly after the LMRDA was enacted, in an opinion letter dated April 20, 1960, the Department took the position that a local union could not enforce a rule refusing all distributions of campaign literature, even if the rule was not discriminatorily applied. In explaining that position, the Department stated:

> Section 401(c) imposes a duty upon labor organizations and their officers to comply with all reasonable

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[23] Petitioners and their amicus do not argue that their interpretation of the statute is mandated by its plain language. See Pet. Br. 12 ("'plain' language of the statute does not compel either interpretation"); AFL-CIO Br. 8. Their argument is based almost entirely on their view that the LMRDA's "purpose" of promoting union self-governance and issuance of mandatory election rules supports the standard they propose.

> requests of any candidate to distribute at the candidate's expense his campaign literature to all members of the union in good standing. For the union to deny *any* such request would clearly violate this duty, *regardless of whether all candidates are treated alike in this respect.*[24]

Thus, the Secretary's early interpretation of Section 401(c) was that a union could not deny "any" reasonable request, even if the denial was pursuant to a uniformly imposed policy or practice.

Regulations later promulgated under the Act made clear that a union must comply with "all reasonable requests of any candidate to distribute campaign literature to the membership at his expense." 29 C.F.R. 452.67; see also 29 C.F.R. 452.69 ("a union and its officers must honor a candidate's request for distribution where the candidate is willing and able to bear the expense of such distribution"; "labor organizations have an *affirmative duty* to comply with all reasonable [distribution] requests") (emphasis added); 29 C.F.R. 452.79-452.80.[25]

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[24] Letter of J. L. Holcombe, Commissioner of Labor-Management Relations and Cooperative Programs, to J. W. Brown, General Counsel, Hotel & Restaurant Employees and Bartenders International Union (Apr. 20, 1960) (emphasis supplied). This position was later incorporated into the Department's *LMRDA Interpretative Manual* (1971), a handbook of official interpretations which guides Department personnel in administering the Act and which is available to the public. See Section 431.007. Both of these documents were appended to the Secretary's amicus brief filed with the court of appeals in this case; copies have been lodged with the Court.

[25] Petitioners argue (Pet. Br. 21 & n.5) that Section 452.69 is not instructive because it stipulates that a union rule denying *all* reasonable requests violates the Act, a proposition that petitioners do not dispute because such a rule is patently unreasonable. But the Secretary's rationale for her conclusion is, as the 1960 opinion letter illustrates, pp. 25-26, *supra*, that a union policy denying *any* reasonable request is invalid, even if uniformly applied.

Finally, pursuant to authority conferred by Section 402, 29 U.S.C. 482, the Secretary has filed enforcement actions asserting that a union's denial of a reasonable request, even if based on a reasonable union rule, is unlawful. See *Donovan* v. *Metropolitan District Council of Carpenters*, 797 F.2d 140 (3d Cir. 1986); see also *Marshall* v. *Provision House Workers Union, Local 274*, 623 F.2d 1322 (9th Cir. 1980) (denial of distribution request violated the Act because the union unreasonably applied its distribution rule; the reasonableness of the rule itself was not challenged); *Marshall* Gov't C.A. Br. 15-16, 26 n.18, 27.

Petitioners and their amicus nevertheless argue (Pet. Br. 21; AFL-CIO Br. 3, 7, 23 n.12)) that the Secretary's position is inconsistent with a portion of one of her regulations, 29 C.F.R. 452.67, stating that "[i]n order to avoid charges of disparity of treatment among candidates, it is advised that a union inform all candidates in advance of the conditions under which distribution will be made and promptly advise them of any change in those conditions." The Secretary envisioned, and continues to maintain, that unions should notify their members as to numerous technical aspects of distribution, *e.g.*, requirements that the requests be sent by certified mail or that payment be tendered in advance. See Gov't C.A. Br. 14. Further, insofar as union rules express administrative and other constraints on the union, they can indicate to members the circumstances under which a request will be found "reasonable." See pp. 10-11, *supra*. The Secretary's encouragement of such notification is not inconsistent with her recognition that when a civil action is brought under Section 401(c), the court must look to the reasonableness of a candidate's request rather than the reasonableness of a union rule.[26]

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[26] The district court accurately observed that unions may draft enforceable rules, so long as they are of sufficient breadth that they will not result in the denial of a candidate's reasonable request. J.A. 77. Although petitioners and their amicus assert (Pet.

In short, the Secretary has reasonably and consistently interpreted Section 401(c) to command that unions comply with "all reasonable requests" for distribution of campaign literature, whether or not the union also has rules that guide those requests. Even if this conclusion were not mandated by the plain terms of the statute, the Secretary's interpretation comports with the purpose of Section 401(c)—to promote union democracy by providing candidates with an individual right to communicate with the union electorate—and is therefore entitled to deference. *Chevron*, 467 U.S. at 843.

Br. 25; AFL-CIO Br. 23) that this approach injects too much uncertainty into the electoral regime, the existence of any such uncertainty is the necessary byproduct of the LMRDA's mandate for democratic elections. This Court rejected virtually the same objection concerning the standard for "reasonable qualifications" for candidates under Section 401(e), noting that the standard it endorsed "leads to more uncertainty than would a less flexible rule * * * [b]ut [that] in using the word 'reasonable,' Congress clearly contemplated exactly such a flexible result." *Local 3489*, 429 U.S. at 312, 313.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, *et al.*,
Petitioners,

v.

TIMOTHY A. BROWN,
Respondent.

On Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO")—a federation of 90 national and international labor organizations having a total membership of approximately 14 million working men and women—is filed with the consent of the parties as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Section 401(c) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481(c) ("LMRDA" or "the Act") places two duties on a labor organization with respect to requests by candidates for union office that the union mail campaign literature to its membership for the candidates during union elections.

First, § 401(c) requires a union to "comply with all reasonable requests" by candidates for union office that the union, "at the candidate's expense," use the union's mailing lists to distribute campaign literature to the membership.

Second, § 401(c) prohibits union "discrimination in favor of or against any candidate with respect to the use of lists of members." [1]

In addition, § 401(e) of the Act requires that, should a union adopt in its constitution or bylaws rules for distributing candidate literature in its elections, those elections shall, then, "be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of [the Act]." 29 U.S.C. § 481(e).

[1] Section 401(c), 29 U.S.C. § 481(c), provides in relevant part as follows:

> Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution.

2. In preference to being required to evaluate the "reasonableness" of each campaign literature distribution request by a candidate on an *ad hoc* basis, many unions have sought to assure fairness and consistency in the administration of their election processes by adopting in their constitution or bylaws electoral rules that define how and when candidates' campaign literature distribution requests should be made. Indeed, this approach has been endorsed by the Department of Labor's regulations, which state that "[i]n order to avoid charges of disparity of treatment among candidates, it is advised that a union inform all candidates in advance of the conditions under which distribution will be made and promptly advise them of any change in these conditions." 29 C.F.R. § 452.67.

This case concerns the status of such internal union rules in determining whether a candidate's literature distribution request is a "reasonable request" under LMRDA § 401(c). Specifically, the case presents the issue of whether—once a union adopts rules that are themselves fair, nondiscriminatory, reasonable and uniformly enforced—the union may judge the "reasonableness" of requests by candidates against those rules rather than on an *ad hoc* basis, so that candidate requests that conform to such rules may be treated as "reasonable" under § 401(c) and candidate requests that conflict may be treated as "unreasonable."

3. Petitioner International Organization of Masters, Mates and Pilots ("MM&P" or "the Union") denied a request by a self-proclaimed candidate for union office, Respondent Timothy A. Brown, that MM&P distribute his campaign literature months before the Union's con-

vention. The Union denied this request because, under its constitution, the convention marks the opening of the Union's officer election process, with all distributions of candidate materials to be made after the certification of candidates following the convention and to be handled by an independent and impartial balloting agency selected by the convention.

Throughout these proceedings the Union has sought to defend its decision on the basis that Brown's request—because the request conflicted with fair, nondiscriminatory, reasonable and uniformly enforced union election rules respecting literature distribution—was not a "reasonable request" under LMRDA § 401(c).

Each of the courts below rejected the Union's proffered defense on the ground that the § 401(c) inquiry into "reasonableness" is directed *only* at the candidate's request, which must be looked at on its own under the particular circumstances at the time and *without reference* to the status of the request under any union election rules, no matter how "reasonable" the rules may be.[2]

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[2] The district court had held that the reasonableness of the Union's rules was legally irrelevant (Pet. App. 3c) but then went on to hold that the Union's rules were unreasonable (Pet. App. 4c-6c). The Union appealed, asserting that each of these holdings was erroneous. With respect to the latter holding, the Union argued that the district court had held no hearings on the rules' reasonableness and had denied the Union's request to submit evidence on the reasons for and the operation of the rules.

On appeal, the Fourth Circuit's panel explicitly refused to assess the reasonableness of the Union's rules. In the panel's view, the statute's clear language establishes a "test [which is] not whether the union's rule was reasonable but whether the candidate's request was reasonable." Pet. App. 15a. To consider whether a candidate's request complied with internal union rules, the panel argued, would be to "stand[] the statute on its head . . . by making the issue the reasonableness of the union by-law rather than, as the statute declares . . . the reasonableness of the plaintiff's request." Pet. App. 14a.

The *en banc* majority adopted the panel majority opinion as its own. Pet. App. 2b.

In the Fourth Circuit's consideration of the case, dissenting judges on both the panel and the *en banc* court strenuously objected to this construction of § 401(c). In agreement with two other circuits which had previously confronted this issue, these judges concluded that if a union rule is "reasonable" in its general application, a candidate's request for literature distribution that fails to conform to the rule is not a "reasonable request." As Judge Hall stated, where that is the case, the request "threat[ens] the union's ability to organize its own internal affairs" in a fair and consistent manner (Pet. App. 19a), and therefore "a request for mailing that conflicts with the established internal procedures of a union is *per se* unreasonable unless the union's procedures are shown to be unfair or discriminatory" (Pet. App. 16a).[3]

Thus, this case, as it presents itself to this Court, raises a single legal question: whether a union—after adopting fair, nondiscriminatory, reasonable and uniformly administered union rules regarding how and when the union will distribute candidates' campaign literature—must, nonetheless, ignore such rules in determining whether candidate requests are LMRDA § 401(c) "reasonable requests" and must, accordingly, comply with requests despite their inconsistency with the union's reasonable rules.[4]

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[3] *See also* Pet. App. 3b-4b (*en banc*) (Phillips, J. dissenting) ("[i]f a union's general rule is not unfair or arbitrary in its general application, than a candidate's request to be exempted from its requirements is obviously 'unreasonable' "); *accord, Donovan v. Metropolitan District Council of Carpenters*, 797 F.2d 140 (3d Cir. 1986); *Marshall v. Provision House Workers*, 623 F.2d 1322 (9th Cir. 1980).

[4] As we have noted, the district court held that the union rules in question were not "reasonable" in terms of the LMRDA's policies. *See* note 2, *supra*. The Union appealed from this holding, but the court of appeals determined that the "reasonableness" of the rules was not legally relevant and that the Union violated the Act even if its rules were "reasonable". *Id.* Given that the question presented

As we now show, a union policy of promulgating and uniformly administering election rules respecting candidate literature distribution requests is fully consistent with the Act, so long as the rules themselves, judged in their general application, are consistent with the Act's policies. Unions attempting to comply with § 401(c) are faced with only a general mandate to comply with "reasonable" requests and a specific command to refrain from unequal treatment. Given this, it is perfectly sound for unions—like myriad other institutions faced with the need to limit official discretion—to particularize a "reasonableness" standard by adopting rules and eliminating reliance on individual union officers' subjective *ad hoc* determinations of "reasonableness." *See* pages 8-9, *infra*.

Such a union policy is fully consistent with the statutory language, since "reasonableness" is a standard that requires reference to the surrounding context, and here the surrounding context includes the union's legitimate interests in following clearly stated and consistently followed principles of administration and its decision to proceed by adopting rules in order to further such interests. *See* pages 9-10, *infra*. Indeed, this Court has expressly held that Congress' use of "reasonableness" standards in the LMRDA reflects a recognition of these legitimate institutional interests and a legislative determination in favor of union self-government and autonomy. *See* pages 10-11, *infra*.

The case for allowing unions to assess candidate literature distribution requests through rules is especially compelling, since—as Department of Labor regulations

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in this case concerns whether the court of appeals' legal theory is correct, this brief will assume *arguendo* that the union rules involved in this case are entirely reasonable. Of course, if this Court reverses the court of appeals' judgment, a remand for full litigation of this unresolved issue would be appropriate.

acknowledge—use of such rules promotes the democratic policies of the LMRDA as well. By assuring that elections will be conducted according to neutral principles adopted before specific candidates come forward, by eliminating officer discretion, and by giving public notice to candidates of their rights and obligations and the rights and obligations of their competitors, the use of rules in this context clearly promotes fair, open, and democratic union government. *See* pages 11-14, *infra*.

Respondent and the United States have in large part relied on various arguments that the statute's language and structure imply that a candidate has a right to have his request assessed without reference to any union rules. As we show, these arguments are erroneous. *See* pages 14-19, *infra*. Their major policy argument—that allowing unions to operate by use of rules will inevitably enhance the power of incumbent officials—is also entirely without merit, since the very essence of government by rules is to *diminish* official discretion and since any rules which fail to meet statutory standards would, of course, be fully subject to challenge. *See* pages 19-21, *infra*.

Moreover, as we show, given the structure of the statute and the relevant Labor Department regulation, the reading of the statute advocated by Respondent and by the United States leads to absurd results and undermines rather than promotes the statutory goal of assuring orderly and democratic union government. *See* pages 21-24, *infra*.

ARGUMENT

1. LMRDA § 401(c)'s open-textured requirement that unions must comply with "reasonable" candidate campaign literature distribution requests raises more questions than it answers—for union leaders attempting to comply with the provision, for union members attempting to assure such compliance, and for candidates seeking to ascertain their rights and to plan their campaigns. Only this much is plain: unions need *not* comply with *all* such candidate requests, but only with "*reasonable* requests", and the term "reasonable" is nowhere more precisely defined.

As one of the leading scholars on the LMRDA wrote of this provision soon after the Act was adopted, "No prescience is needed to foresee a host of difficult problems relating to the reasonableness of requests by candidates for union office for distribution of campaign literature and to the fairness of union officers' responses." Aaron, *The Labor Management Reporting and Disclosure Act of 1959*, 73 Harv.L.Rev. 851, 903 (1960). Given this vagueness, a union's determination to proceed on an *ad hoc* basis would create obvious problems of potential inconsistencies and of certain unpredictability which would tend to undermine confidence in the union's election processes and, as well, could generate frequent resort to litigation to resolve disputes.

The difficulties posed by *ad hoc* decisionmaking in this area are magnified further by the fact that § 401(c) also places on unions a legal duty to "refrain from discrimination" and to assure "equal treatment" in their handling of candidate literature distribution requests. Thus, for union leaders, *ad hoc* judgments as to "reasonableness" raise the likelihood of legal challenges—whether well-founded or not—complaining of unequal or discriminatory treatment in the management of union elections. For union members—and union candidates—*ad hoc* decisionmaking increases the difficulty of monitoring the union's actions to determine whether unequal treatment

is or is not occurring. Again, for all concerned, the result of *ad hoc* decisionmaking is all too likely to be institutional instability, loss of membership confidence and increased litigation and discord.

These sorts of problems, of course, are not unique to *ad hoc* decisionmaking under LMRDA § 401(c), although the often contentious and emotional nature of internal union politics tends to heighten their seriousness. Rather, these problems are commonplace throughout the society whenever administrative discretion is limited only by highly general standards. *See Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983) (*ad hoc* administrative decisionmaking under vague standards means that affected parties will have no actual notice of legal rights and requirements and that officials will have far greater discretion and far less guidance in their practices).

That being so, institutions of all kinds have recognized the advantages to all concerned of particularizing general standards through the promulgation of more specific rules, which serve both to provide public notice of relevant considerations and to channel and limit official discretion.

2. The language of LMRDA § 401(c) and the policies of the Act both fully support the proposition that a union may judge the "reasonableness" of a candidate's request in terms of its conformity with preexisting union rules, so long as those rules are themselves "reasonable" rules.

a. As we have noted, § 401(c) does *not* require that a union comply with *all* candidate requests that the union distribute literature, but only with "*reasonable*" requests. As Judge Hall explained in his dissent below, "the reasonableness of any action requires consideration of the underlying factual context." Pet. App. 18a. And, the relevant "factual context" here is that the union has adopted reasonable and uniformly enforced election rules, has legitimate interests in the enforcement of such rules,

and is faced with a request that did not conform to such rules.

The issue in this case is thus *not* whether the statute focuses on the "reasonableness" of candidate requests as opposed to the "reasonableness" of union rules; rather the question is whether—given the factual context of pre-existing and reasonable union rules—a candidate's request is "reasonable" when the request fails to conform to the rules' requirements.

The use of the word "reasonable" to modify the LMRDA's guarantees of union members' individual rights is common throughout this statute, in which virtually all such rights are stated in such non-absolute terms. *See, e.g.*, 29 U.S.C. § 411(a)(1) (guarantee of equal rights among union members subject to "reasonable" union rules); 29 U.S.C. § 411(a)(2) (union member's free speech rights subject to "reasonable" union rules regarding conduct of meetings and membership obligations); 29 U.S.C. § 411(a)(4) (union member's right to sue subject to exhaustion of "reasonable" union hearing procedures); 29 U.S.C. § 481(e) (union member's right to be candidate subject to "reasonable" qualifications).

This Court, in analyzing these LMRDA provisions has concluded that the required determination of what is "reasonable" turns on the various "policies that underlie the LMRDA." *Steelworkers v. Sadlowski*, 457 U.S. 102, 111 (1982). In this regard, this Court has emphasized that these underlying policies include *both* the establishment of minimum standards of democratic union governance in light of "revealed abuses" *and* the avoidance of any "unnecessary governmental intrusion into internal union affairs." *Wirtz v. Hotel Employees*, 391 U.S. 492, 496 (1968).[5] Given these policies the Court has

[5] *See also Furniture Moving Drivers v. Crowley*, 467 U.S. 526, 549 (1984) (in addition to concerns for specified democratic standards

made it clear that partial restrictions on individual LMRDA rights are "reasonable" when those restrictions are "reasonably related to the protection of the [labor] organization as an institution." *Steelworkers v. Sadlowski, supra*, 457 U.S. at 112.

Against this legal background it is simply beyond question that a union's interest in being able to structure its internal affairs through uniformly enforced rules—rather than by trusting in the *ad hoc* judgments of its officers—is an interest fully recognized under the Act, so long as the union's rules are reasonable when judged by reference to the statute's policies.

b. In the context here at issue, the union's interest in rulemaking and in uniform rule enforcement furthers *both* the union's interests in self-governance and autonomy *and* the broader public interest in more democratic union election procedures. Such rules—at least so long as the rules are reasonable—do *not* pit the interest in union self-governance *against* a competing interest in more democratic procedures.

"another primary goal of Congress was to maximize the amount of independence and self-government granted to unions"). This statute's concern for union self-government was also extensively discussed in *Steelworkers v. Sadlowski, supra* 457 U.S. at 117:

> In drafting [the LMRDA], Congress was guided by the general principle that unions should be left free to "operate their own affairs, as far as possible." S.Rep. No. 1684, 85th Cong. 2d Sess. 4-5 (1958). It believed that only essential standards should be imposed by legislation, and that in establishing those standards, great care should be taken not to undermine union self-government. Given certain minimum standards, "individual members are fully competent to regulate union affairs." *Ibid.* Thus, for example, in Title IV, which regulates the conduct of union elections, Congress simply set forth certain minimum standards. So long as unions conform with these standards, they are free "to run their own elections". *Wirtz v. Glass Bottle Blowers*, 389 U.S. [463] at 471 [(1968)].

Of course, the interest in union self-government is clearly furthered by permitting unions to make—and to give effect to—reasonable union rules. The union's rules —and the decision to proceed through rules rather than through officer discretion—are the result of the union's democratic political processes and, as such, reflect the judgments and experiences of union members themselves. Moreover, as Judge Seitz stated in determining that unions could enforce reasonable rules regarding candidate requests for literature distributions: "by minimizing judicial second-guessing, permitting such rules furthers the Act's policy of . . . minimizing government encroachment on union autonomy." *Donovan v. Metropolitan District Council of Carpenters*, 797 F.2d 140, 144 (3d Cir. 1986).[6]

Most to the point, however, *in the election context* a union's reliance on rules tends to serve the vital and democratic functions of making clear to all competing candidates that the electoral process will be conducted according to a previously established, publicly stated, and democratically determined plan on which all the competing candidates can rely. Such an approach, moreover, protects against the possibility that the electoral process will be distorted by the discretionary decisions of officials who, after the officials know who the candidates are, may have—or may appear to have—biases or conflicts of interest. In this way, prior establishment and uniform enforcement of reasonable election rules serve the broad democratic purposes of the LMRDA, and also serve the various other institutional and self-government interests of the union itself.

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[6] Also, quite obviously, permitting such rulemaking furthers certain general and wholly legitimate union institutional interests. Thus, for example, distribution rules assure that distribution requests will not cause unnecessary or unexpected burdens on the union or otherwise unduly interfere with the union's continuing operations as a collective bargaining representative.

That this view of the importance of reasonable election rules, uniformly-enforced, is consistent with the LMRDA's view of the requirements for proper elections cannot be doubted. To assure that electoral processes will be conducted according to a previously established, publicly known, and democratically determined plan, the LMRDA expressly requires that every union election "shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of [the LMRDA]." 29 U.S.C. § 481(e). Thus, the statute itself bars a union's waiver of otherwise valid election rules on the basis of *ad hoc* judgments in particular cases.

c. Another major purpose of the LMRDA is to prevent discrimination and unequal treatment. *See, e.g.*, 29 U.S.C. § 411(a)(1) (assuring union members an equal right to nominate candidates, vote, attend meetings, and otherwise participate in union deliberations); 29 U.S.C. § 481(c) (prohibiting union discrimination and requiring equal treatment in the handling of candidate requests for distributions of campaign materials).

Recognizing this policy and the beneficial effects of uniform rules in effectuating this policy—*viz.*, that adherence to rules prevents unequal treatment and the appearance of unequal treatment—the Department of Labor has explicitly advised unions to adopt and publicly announce rules on literature distribution in advance of elections. *See* 29 C.F.R. § 452.67 ("In order to avoid charges of disparity of treatment among candidates, it is advised that a union inform all candidates in advance of the conditions under which distribution will be made and promptly advise them of any change in those conditions.").

* * * *

Thus, the sum of the matter is that in the context of union elections, the promulgation of reasonable rules—and their uniform enforcement—is a salutary means of

promoting union democracy. Judicial recognition of the validity of such rules, moreover, furthers the Act's "general principle that unions should be left free to 'operate their own affairs, as far as possible,'" *Steelworkers v. Sadlowski, supra*, 457 U.S. at 117 (*quoting* S. Rep. No. 1684, 85th Cong., 2d Sess., 4-5 (1958)).

These things being so, there is simply no basis for treating a candidate's request as an LMRDA § 401(c) "reasonable request" when, in the words of Judge Phillips below, the candidate is requesting to be "made a special case, exempt from the requirements of general laws that are not unfair or arbitrary in their general application." Pet. App. 4b (*en banc*) (Phillips, J., dissenting).

3. Having said this much, we now show that none of the counter arguments that have been made regarding the language, structure and policies of the Act have merit.

a. We begin with the statutory language and structure.

First, the decisions below—and the arguments of counsel for the Respondent and the United States—proceed from the premise that the "plain meaning" of LMRDA § 401(c) *precludes* assessment of the "reasonableness" of candidate requests in terms of pre-existing union rules and instead *mandates* assessment of such requests on an *ad hoc* basis. The panel majority found this "plain meaning" in the fact that the statute refers to the "reasonableness" of "requests":

> The Act seems plain on its face: If the request to distribute . . . is "reasonable" the union is required to "comply with all [such] reasonable requests." This language conditions the right of the contesting union office seeker to have his campaign material distributed only on the reasonableness of his request. [Pet. App. 5a.]

Based on this, the panel majority concluded that the statutory language precluded union rules—however reasonable—from determining the outcome of a case.[7]

As we have indicated, however, this view of § 401(c)'s "reasonable request" language simply misconstrues the nature of the relevant inquiry, as well as misconstruing the language, structure and policies of the Act. The issue here is not, as the courts below would have it, whether the statute uses the word "reasonable" to modify "request" rather than "union rules"; it is whether a candidate's request under § 401(c) is a "*reasonable* request" when the request fails to comply with preexisting, reasonable and uniformly enforced union rules. For the reasons stated above, *see* pages 9-11, *supra*, it is sound to regard such rules as forming the relevant context for assessing the "reasonableness" of the request. And, it is equally proper to regard a nonconforming request—which would undermine fully legitimate union interests in the fair, orderly and consistent conduct of its elections, as an "unreasonable" request. *See* pages 11-14, *supra*.

Second, Respondent and the United States urge that the language of § 401(c) precludes any assessment of "reasonableness" in terms of union rules because the word "reasonable" in this provision is unaccompanied by any explicit reference to union rules, while in various other provisions of the Act the word "reasonable" is spe-

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[7] In this regard the panel stated:

> It certainly stands the statute on its head to . . . [make] the issue the reasonableness of the union by-law rather than, as the statute declares, making the issue the reasonableness of the plaintiff's request. The command of the statute may not legitimately be subordinated to the somewhat ambiguous language of a union by-law. Such a rule would render union by-laws superior to the congressional mandate and would provide dissident unions with a ready means for nullifying the statute's command. We are not disposed to uphold such a misconception of congressional power in this field. [Pet. App. 14a.]

cifically accompanied by references to union rules. Respondent's Memorandum in Opposition ("Resp. Mem.") at 9; United States Brief ("U.S. Br.") at 9-10.[8] Based on this language difference, they would have it that Congress must have intended that compliance with union rules is to play *no part* in assessing "reasonableness" under § 401(c). But this difference cuts the opposite way.

A statutory provision stating an individual right and then subjecting that right only to limits found in "reasonable rules" indicates, first, that in the absence of such rules, the right is unlimited, and, second, that no limit may be placed on such a right other than through preexisting rules; *viz.*, that such a right cannot be limited by *ad hoc* judgments. In contrast, a statutory provision stating a limited "reasonable" right is narrower, in that the right is limited even in the absence of the adoption of specific union rules.

The linguistic difference the Respondent and the United States emphasize, in other words, does *not* signify that the right in § 401(c) is more invulnerable to legitimate union restrictions than other rights; rather, the difference signifies that the right is more *vulnerable* to such restrictions. The statutory language does not indicate

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[8] *Compare* LMRDA § 401(c), 29 U.S.C. § 481(c) (union must comply with "reasonable requests" for distributions of candidate literature) *with* LMRDA § 401(e), 29 U.S.C. § 481(e) ("every member in good standing shall be eligible to be a candidate and to hold office (subject to . . . reasonable qualifications uniformly imposed"); LMRDA § 101(a)(1), 29 U.S.C. § 411(a)(1) (providing union members with equal rights and privileges to nominate candidates, to vote in elections or referendums, to attend union meetings and to participate in deliberations and voting at such meetings, "subject to reasonable rules and regulations in [a labor organization's] constitution and bylaws"). LMRDA § 101(a)(2), 29 U.S.C. § 411(a)(2) (providing union members with rights of free speech and assembly "subject to the organization's established and reasonable rules pertaining to the conduct of meetings" and the "responsibility of every union member toward the organization as an institution").

that union rules may not be considered in determining the limits of § 401(c); but, rather, that the union may place limits on candidate distribution rights either through rules or through *ad hoc* determinations.

Third, the United States also urges that the enforcement language of § 401(c) indicates that Congress intended that the "reasonableness" of a candidate's request should be assessed with a uniquely diminished concern for union self-government interests, because unlike most provisions of Title IV of the LMRDA, 29 U.S.C. §§ 481-483—which are enforced by the Secretary of Labor only after waiting for limited exhaustion of internal union procedures—a denial of a candidate's § 401(c) request can be raised in an immediate, private cause of action. U.S. Br. at 9-10. The United States urges that Congress' choice of a private enforcement scheme signifies Congress' belief that this right should outweigh competing union interests in self-governance. Once again, the difference the United States points to provides no support for the conclusion it urges.

As even the most cursory examination of Title I of the LMRDA reveals, the right at issue in this case is far from the only election-related right in the Act that is enforceable through immediate private suits. *See* LMRDA Title I, 29 U.S.C. §§ 411-415.[9] And, as this Court's Title I decisions make emphatically clear, Congress intended these rights—like Title IV rights—to be interpreted in a manner that recognizes the Act's policy of substantial deference to the principle of union self-government. *See*

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[9] Title I of the LMRDA, containing the "Bill of Rights of Members of Labor Organizations" assures each union member of certain legally protected rights, many of which relate to elections. *See, e.g.*, 29 U.S.C. § 411(a)(1) (equal right to nominate candidates, vote in elections, attend and vote in meetings and participate in deliberations); 29 U.S.C. § 411(a)(2) (right of free speech and assembly). Violations of Title I rights are enforceable through private causes of action by "[a]ny person whose rights . . . have been infringed." 29 U.S.C. § 412.

Steelworkers v. Sadlowski, supra, 457 U.S. at 111-112, 117 (Title I rights of free speech and association limited by Congress' policy of deference to union self-government interests). Congress thus saw *no inconsistency whatsoever* between the provision of certain private causes of action and the principle that the rights at issue in such actions are limited by the policy of minimizing interference in union self-government.

Moreover, as this Court has also recognized, Congress selected different enforcement schemes not on a hierarchy of rights but by reference to the *remedies* provided for in different causes of actions. And Congress' principle of selection rests on the LMRDA's general rule that to the extent possible *it is desirable to promote union self-government interests.*

Private preelection suits are therefore permitted only where the remedies available are "less intrusive" into union self-governance. *Furniture Moving Drivers v. Crowley,* 467 U.S. 526, 550 (1984). Where actions involve "more drastic remedies"—*viz.*, setting aside an election—suit may only be brought by the Secretary of Labor after allowing for internal union proceedings. 467 U.S. at 546. Thus, Congress did not intend union self-government interests to be accorded less weight where rights are subject to private enforcement.

Before turning to the major policy argument raised by Respondent and the United States, one last point should be emphasized concerning these arguments based on supposed implications of statutory language and structure. Each of these arguments is, in substance, an assertion that subtle distinctions between § 401(c)'s language and the other cited provisions' language should be construed to imply that the LMRDA's general balance of policy goals is not relevant with respect to assessing "reasonableness" under § 401(c). This Court, however, has specifically warned against such close textual parsing of the LMRDA and has emphasized instead that all

LMRDA interpretation should focus on the general policies underlying the Act. Because many provisions of the LMRDA were drafted on the spot during Floor consideration of this legislation, this Court has admonished that proper interpretations of the LMRDA "must look to the objectives Congress sought to achieve, and avoid 'placing great emphasis upon close construction of words.'" *Steelworkers v. Sadlowski, supra,* 457 U.S. at 111 (*quoting Wirtz v. Glass Bottle Blowers,* 389 U.S. 463, 468 & n.6 (1968)). *See also* Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959,* 58 Mich. L. Rev. 819, 852 (1960).[10]

b. Respondent and the United States argue that the LMRDA's policy of assuring fairness to non-incumbent candidates supports the decision below. Allowing unions to rely on rules, they argue, will inevitably and illegitimately increase the powers of incumbent leaders over challengers. Fairness to non-incumbents requires assessment of each candidate's requests for distribution of campaign literature on an *ad hoc* basis, rather than on the basis of each request's conformity with reasonable and pre-established union rules. Resp. Mem. at 11, U.S. Br. at 12. Again, the opposite is true.

First, in assessing this argument it is essential to recognize at the outset that a union's right to assess the "reasonableness" of candidates' requests in terms of the requests' conformity with "reasonable" union rules does *not* in any way preclude challenges asserting that the rules themselves are *not "reasonable"* in terms of the Act's policies.

Very simply stated, private parties cannot contract out of public law. Thus, to the extent that a union's election

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[10] Like many other LMRDA provisions, the language of § 401(c) is in large part a result of a floor amendment. *See* 105 Cong. Rec. 6727-6728 (1959), *reprinted in* 2 NLRB, Legislative History of the LMRDA 1240 (1959) (Sen. Javits' introduction of provision during floor debate).

rules regarding literature distribution unfairly favor incumbents—or otherwise conflict with the policies of the Act—the rules are invalid and may not be relied on. So long as a candidate may challenge the substance of such rules as conflicting with the Act's policies, there is simply no reason to believe that reliance on rules adopted beforehand—rather than *ad hoc* judgments at the time—will undermine the Act's policies of promoting democratic procedures.

Second, it makes no sense whatsoever to assert that the power of union officers is *increased* by the adoption and uniform enforcement of rules that, by their nature, *diminish* those officers' discretion. In the absence of rules of general application, it will normally fall on union officers to make *ad hoc* judgments concerning what constitutes a "reasonable" request. And, in the absence of the uniform enforcement of rules, it will normally fall on union officers to determine when exceptions are merited. Under such regimes, initial judgments depend on the officers' subjective—and possibly unarticulated—sense of reasonableness, and under such regimes monitoring of an officer's behavior for consistency is far more difficult. Rules are the classic means of restricting official discretion, and it defies logic to assert that giving effect to substantively reasonable union rules increases the powers of incumbent leadership.[11]

Third, a union's reliance on uniformly enforced election rules may serve a significant educational function that may in itself serve to open the union's political process.

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[11] As we have noted, the fact that governance through binding rules reduces discretion and thus promotes consistency and equal treatment is recognized in the LMRDA itself, *see* 29 U.S.C. § 401(e) (unions must conduct their elections in conformity with their constitution and bylaws), and in the relevant regulations of the Department of Labor, *see* 29 C.F.R. § 452.67 (advising unions to adopt clear rules on distribution of campaign literature "[i]n order to avoid charges of disparity of treatment among candidates").

The framing of prospective rules as part of the union's constitution or bylaws may focus the union's membership on the policy issue at stake. In that way, making the decision on the need for and the content of the rules provides an opportunity for public debate and participation not present in a system depending on *ad hoc* decisions by union officers.

Similarly, the very existence of explicit rules—rather than *ad hoc* practices—may serve to educate union members, including candidates and prospective candidates, on the union's election process. Candidates and prospective candidates may learn of their rights and obligations from the rules, and can rely on the fact that their competitors are equally subject to those rules. Members who are dissatisfied with the rules may—since the rules are explicit—challenge them more easily either through internal political processes or through legal proceedings.

In all of these ways, a regime of preexisting and uniformly enforced reasonable rules may serve to facilitate a political process in which the discretion of incumbent leadership plays less of a role than it otherwise would in determining the "reasonableness" of a candidate's request that the union distribute his literature. The assertions that such a regime enhances incumbent power simply make no sense.

c. As we have noted, the Department of Labor has, in its regulations respecting LMRDA § 401(c), explicitly advised unions to adopt rules regarding candidate literature distribution requests in advance of elections. And this advice is based on the proposition that such rules will *reduce* official discretion and thus the possibility—and perception—of unequal treatment among candidates. *See* 29 C.F.R. § 452.67. In this case, however, the United States seeks to reformulate its position, urging that unions may—and should—adopt rules regarding candidate requests for union distribution of campaign literature—recognizing that such rules have beneficial results—but

then asserting that unions may *not* legally follow such rules in any case where a candidate's non-complying request would be "reasonable" apart from consideration of its noncompliance with the rules. *See* U.S. Br. at 15 n.8. In essence, the United States asserts that unions should adopt rules but should not apply the rules so adopted. Such a view of the Act defies logic and, given the structure of the LMRDA, leads to an absurd result.

(i) The United States' position calls for a regime in which a union establishes a rule—presumably to reduce official discretion, provide candidates with notice of what they and their competitors can expect, and assure all that there will be equal treatment—and, at the same time, it requires union officers to waive compliance whenever the officers believe (or predict that a court will believe) that a non-complying request is otherwise reasonable. The illogic is clear: under such a regime officials would retain substantial unguided discretion, candidates would hardly be secure in knowing the rules that they and their opponents may follow, and candidates denied waivers would have little assurance that they have not suffered unfair and unequal treatment.

In short, such a regime undermines all of the beneficial results obtainable from rulemaking. The present position of the United States amounts to little more than an illogical assertion that unions should adopt rules while continuing to administer their elections without reference to them.

(ii) Of equal moment, the structure of the LMRDA would place any union which followed such a course in an intolerable legal position; a result Congress clearly could not have intended.

As noted, LMRDA § 401(e) mandates that all union elections "shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of [Title IV]." 29 U.S.C. § 481(e). Any union which adopts rules regulating campaign literature distributions must therefore follow those rules *unless to do so would violate the Act.* For example, a union that allowed literature distributions contrary to its rules would risk a challenge on behalf of a candidate who was thereby prejudiced, unless the LMRDA required the distributions.

Given § 401(e), a union that followed the United States' advice—*viz.*, a union with rules *and* with a policy of waiving those rules whenever a request seems otherwise "reasonable"—would act at its peril in close cases regardless of what choice the union might make. Any denial of a nonconforming request would violate § 401(c) if the request is subsequently held to have been "reasonable" despite its nonconformance with a reasonable rule. And, any grant of a nonconforming request would violate § 401(e) if the waiver of the rule is subsequently challenged and found not to have been legally required; *viz.*, if the noncomplying request is found *not* to have been "reasonable".

Under the legal regime urged by the United States, therefore, a union adopts rules on this subject only at the price of risking liability whenever the union is requested to waive its rules, however the union may treat the request. Under such a regime, few, if any, unions will adopt campaign material distribution rules.[12]

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[12] The United States argues that the position of the Department of Labor in favor of Respondent is entitled to deference from this Court. U.S. Br. at 15-16. No such deference is owed. As we have repeatedly noted, the Department of Labor has, in its authoritative regulations, advised unions to adopt rules. 29 C.F.R. § 452.67. And none of the administrative materials cited by the United States contain any statement that unions should not rely on or enforce such rules when confronted with nonconforming candidate requests. The principle regulations relied on by the United States contain no language other than the unexplained statutory "reasonable request" language, and thus, they hardly advance the inquiry. *See* U.S. Br. at 15 (*citing* 29 C.F.R. §§ 452.67, 452.69). The administrative letter and the other regulations cited by the United States contain no

d. Ultimately, the positions of Respondent, the United States, and the courts below rest on the notion that the LMRDA is a statute based on pervasive distrust of the ability of unions to structure their own affairs fairly and to conduct their own elections according to democratic principles. That is *not* the theory of the LMRDA. *See* pages 9-11 & n.5, *supra*. All policies of the LMRDA concerning candidates' rights to have their campaign materials distributed are fully accounted for as long as a candidate may challenge a rule that is enforced against him as representing a policy inconsistent with the Act. The LMRDA's policies are furthered not at all by precluding unions from adopting reasonable rules on this subject and uniformly enforcing such rules in the course of conducting their elections.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings regarding the "reasonableness" of the Union's rules.

Respectfully submitted,

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discussion of the legal issue before the Court, but are only relevant on the reasonableness of the specific MM&P rule. *See* U.S. Br. at 15 (citing private administrative letter and 29 C.F.R. §§ 452.79 and 452.80).

FOR ARGUMENT

No. 89-1330

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, ROBERT J. LOWEN, and F. ELWOOD KYSER,

Petitioners,

—v.—

TIMOTHY A. BROWN,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION FOR UNION DEMOCRACY, THE AMERICAN CIVIL LIBERTIES UNION, AND THE ACLU OF MARYLAND IN SUPPORT OF RESPONDENT

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Lodge 1389, B.R.A.C. v. Dennis,
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Morrissey v. Curran,
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720 F.2d 936 (6th Cir. 1984) 23

Scofield v. NLRB,
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Sheldon v. O'Callaghan,
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cert. denied, 419 U.S. 1090 (1974) 23

United States v. International Brotherhood of Teamsters,
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United States v. Local 560, International Brotherhood of Teamsters,
780 F.2d 267 (3d Cir. 1985),
cert. denied, 476 U.S. 1140 (1986) 8

United Steelworkers v. Sadlowski,
457 U.S. 102 (1982) . . . . . *passim*

Whirlpool Corp. v. Marshall,
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Wirtz v. Local 153, Glass Bottle Blowers,
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Hearings on S.505 Before the Subcommittee on Labor of the Committee on Labor and Public Welfare,
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NLRB, Legislative History of the LMRDA (1960) 8, 11, 21

S.Rep. No. 187, 86th Cong., 1st Sess. (1959) 8, 21

S.Rep. No. 1684, 85th Cong., 2d Sess. (1958) 7

S.Rep.No. 1417, 85th Cong., 2d Sess. (1958) 9

Other Authorities

Aaron, "The Labor-Management Reporting and Disclosure Act of 1959," 73 Harv.L.Rev. 851 (1960) 2

Applebaum & Blaine, "Compensation and Turnover of Union Officers," 14 Indus.Rel. 156 (1975) 14

Edelstein, J. & Warner, M., *Comparative Union Democracy: Organization and Opposition in British and American* (rev.ed. 1979) 20

Estey, M., *The Unions: Structure, Development and Management* (3d ed. 1981) 12, 13

Goldberg, "Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement," 1989 Duke L.J. 903 ..... 7, 8

Ifshin, "An Analysis of the Impact of the Federal Election Campaign Act on the 1976 Democratic Presidential Primary," 18 Santa Clara L.Rev. 1 (1978) 18

Jacobs & Spring, "Fair Coverage in Internal Union Periodicals," 4 Indus.Rel.L.J. 204 (1981) 17

James, "Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections," 13 Harv. C.R.-C.L. L.Rev. 247 (1978) 11, 12, 21

Levy, "Legal Responses to Rank-and-File Dissent: Restrictions on Union Officer Autonomy," 30 Buffalo L.Rev. 663 (1981) 7

Lipset, S., Trow, M. & Coleman, J., *Union Democracy* (1956) 12, 16

McAdams, A., *Power and Politics in Labor Legislation* (1964) 16

McLaughlin, D. & Schoomaker, A., *The Landrum-Griffin Act and Union Democracy* (1979) 12, 17

Note, "Union Elections and the LMRDA: Thirteen Years of Use and Abuse," 81 Yale L.J. 407 (1972) 12

Nyden, "Democratizing Organizations: A Case Study of a Union Reform Movement," 90 Am.J.Soc. 1179 (1985) 19

Quaglieri, "The New People of Power: The Backgrounds and Careers of Top Labor Leaders," 9 J.Lab.Res. 271 (1988) 14

Rothman, "Legislative History of the 'Bill of Rights' for Union Members," 45 Minn.L.Rev. 199 (1960) 2

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Strauss, "Control by the Membership in Building Trades Unions," *in Unions and Union Leadership* (J. Barbash ed. 1959) 18

Summers, "Democracy in a One-Party State: Perspectives From Landrum-Griffin," 43 Md.L.Rev. 93 (1984) 12, 13, 19, 26

Wallihan, J., *Union Government and Organization* (1985) 12, 14

INTEREST OF *AMICI*[1]

The Association for Union Democracy (AUD) is a nonprofit corporation founded in 1969 which seeks to further democratic principles and practices in American labor organizations, both by encouraging union members to participate actively in the internal life of their unions, and by protecting the exercise of their democratic rights within their unions. No other organization devotes itself primarily to this objective.

The sponsors of the Association include former leaders of major unions, religious leaders, members of union public review boards, lawyers, prominent educators in labor studies and labor law, and numerous union members. Despite divergent backgrounds, all share the view that the labor movement is one of the great forces which helps sustain democracy in our national life and that, if it is to serve this purpose, union leaders must be responsive to their members, and unions must be democratic and just in their internal operations.

The Association has assisted union members seeking to secure honest and fair elections in the United Mine Workers of America in 1972 and the United Steelworkers in 1978. The AUD is currently playing a similar role in elections being held in the International Brotherhood of Teamsters pursuant to the civil RICO consent decree in *United States v. International Brotherhood of Teamsters*, 88 Civ. 4486 (S.D.N.Y. Mar. 13, 1989).

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Maryland is one of its statewide affiliates. For over forty years, the ACLU has supported efforts in Congress

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of this Court pursuant to Rule 37.3.

and in the courts to recognize and strengthen the rights of union members to internal union democracy. Indeed, as commentators have noted, the legislative campaign that eventually culminated in the enactment of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) "was formally launched by the American Civil Liberties Union [when it] submitted a 'Trade Union Democracy' bill to the Congress during the 1947 hearings on new labor legislation." Aaron, "The Labor-Management Reporting and Disclosure Act of 1959," 73 Harv.L.Rev. 851 (1960). *See also* Rothman, "Legislative History of the 'Bill of Rights' for Union Members," 45 Minn.L.Rev. 199, 201-06 (1960).

Because the rights of union members to democratic self-governance are implicated by the decision below, the AUD and the ACLU join with respondent and urge the Court to affirm the judgment below.

SUMMARY OF ARGUMENT

This case raises a question of statutory construction essential to a worker's right to free and fair union elections: whether §401(c) of the LMRDA, 29 U.S.C. §481(c), requires deference to a union's election rules when a court evaluates the reasonableness of a candidate's request for the mailing of campaign literature at the candidate's own expense. In the real world of union elections, the issues before the Court are these: Can a union, by promulgating a restrictive rule -- in this case, one barring the use of union membership lists for campaign mailings until a period late in the campaign, after candidates are formally nominated -- prevent a candidate for union office from utilizing what is often the only effective means of communicating with union members at crucial, formative stages of a candidate's campaign? And can a union, through such a restrictive rule, substantially undermine the membership's right to be kept

informed of union affairs? The LMRDA is designed to promote union democracy by providing for fair and informed union elections. The answers to these questions must therefore be no.

The clear and unambiguous language of §401(c) requires unions to "comply with *all* reasonable requests" of a candidate to mail campaign literature to the union's membership at the candidate's expense (emphasis added). Nothing in the language or legislative history of that section supports petitioners' contention that the reasonableness of a candidate's request must be measured by its consistency with the union's own election rules. On the contrary, when Congress intended rights created by the LMRDA to yield to reasonable union rules, it quite explicitly provided for that result in other sections of the Act. Where union rules conflict with LMRDA rights that are not limited by such provisos -- like those in §401(c) -- Congress made clear its intent that such union rules "shall be of no force or effect." LMRDA §101(b), 29 U.S.C. §411(b).

The legislative purpose of the LMRDA supports this reading: LMRDA was intended to help alleviate union corruption by promoting democracy in internal union affairs. In pursuing that goal, Congress recognized that incumbents often enjoy tremendous advantages over their challengers in union elections. Congress thus designed the LMRDA to reduce the advantages of incumbency and to level the playing field between challengers and incumbents in union elections.

In particular, Congress intended the candidate mailing rights provided by §401(c) to counteract one of the most important advantages enjoyed by incumbents -- control over the means of communication with the union's membership. Incumbent union officers are in a position to use their control over the union newspaper, in effect, to begin their reelection campaigns the day after they take office. They typically do so in the con-

text of a one-party system, without any organized, ongoing opposition. Congress recognized that union elections will be fair only if challengers also have opportunities for early communication with the membership through §401(c) mailings.

Congress also intended the LMRDA to enable union members to obtain the knowledge they need to make informed decisions about union affairs and to cast informed votes in union elections. In the context of the union member's "right to know" and the Act's remedial purpose, §401(c) must be construed to permit candidates to mail campaign literature at their own expense any time during a campaign, when key issues are emerging, candidates are assembling their slates, and the voters' minds are still open.

Even if this Court concludes that some deference is due reasonable union election rules in determining the reasonableness of a candidate's request for the mailing of campaign literature, the union rules at issue in this case are entitled to no deference because they violate the LMRDA's legislative purpose and are therefore unreasonable. The antidemocratic effects of petitioners' rules are substantial and far outweigh any legitimate union interests advanced in their support.

I. THE PLAIN MEANING OF THE LMRDA'S WORDING REQUIRES THE REASONABLENESS OF A CANDIDATE'S REQUEST FOR THE MAILING OF CAMPAIGN LITERATURE TO BE DETERMINED WITHOUT REGARD TO UNION ELECTION RULES

According to the clear and unambiguous language of §401(c) of the LMRDA, unions must "comply with *all* reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing . . . ." 29 U.S.C. §481(c)(emphasis added). Petitioners contend that the reasonableness of a candidate's request is to be determined by considering the reasonableness of union rules limiting the candidate's right to mail campaign literature. This position is supported by neither the language nor the legislative history of the LMRDA, however, and it must therefore be rejected by this Court.

Petitioners can point to nothing in the statute or its legislative history to support their contention that the reasonableness of a candidate's request must be measured by its consistency with the union's own election rules. On the contrary, the LMRDA's wording and structure require that the reasonableness of a candidate's request for the mailing of campaign literature be determined exclusively on its own merits, without regard to inconsistent union rules. Those arguments are fully made by the respondent and the government. *Amici* will simply add a few brief points.

Where Congress intended LMRDA rights to yield to reasonable union rules, it provided for that result explicitly. *See* LMRDA §101(a)(1), 29 U.S.C. §411(a)(1) (members' right to equal treatment "subject to reasonable [union] rules"); *id.* at §101(a)(2), 29 U.S.C. §411(a)(2)(members' freedom of speech and assembly "subject to . . . reasonable [union] rules"); *id.* at §401(e), 29 U.S.C. §481(e)(members' right to run for union office "subject to . . . reasonable qualifications uniformly imposed [by the union]).

Where such explicit reasonable rule provisos were omitted from the statute, Congress made it quite clear that union rules were to yield to the rights and duties created by the statute and not, as petitioners would have it, the other way around. For example, §401(e) mandates that union elections "shall be conducted in accordance with the [union's] constitution and bylaws," but only, however, "insofar as they are not inconsistent with

the provisions of this title." 29 U.S.C. §481(e).[2]

Petitioners and *amicus* AFL-CIO are beside the point when they suggest that the decision below somehow forces unions to abandon all rules governing candidates' rights to mail campaign literature and compels union officials to rely solely on *ad hoc* decisionmaking when evaluating candidates' requests for mailings. The issue is not whether unions can have election rules. They can and they should.[3] The issue is whether they can have rules that operate to defeat candidates' rights expressly created by §401(c). That they cannot do.

Nothing in the statute suggests that Congress intended to permit unions, through their election rules, to limit the effectiveness of a candidate's mailings or to decide when meaningful campaigning through the mails could begin. Had Congress intended to bar early use of §401(c)'s campaign mailing right, it would have done so explicitly, just as the same subsection of the Act expressly limits a candidate's right to inspect union membership

[2] Similarly, in what was effectively Congress' last word on the subject, since it was added on the floor of the Senate as part of the union members' bill of rights, §101(b) states bluntly that "[a]ny provision of [a union's] constitution and bylaws . . . which is inconsistent with the provisions of this section shall be of no force or effect." 29 U.S.C. §411(b).

[3] For example, union rules could require that the estimated costs of candidate mailings be tendered to the union in advance, or that requests for mailings be submitted at least three working days before the candidate wants the literature mailed, or that all candidate mailings be handled by the XYZ commercial mailing company, all without substantively interfering with candidates' §401(c) rights to have their campaign literature mailed to the union's membership.

lists to the final thirty days of an election campaign.[4]

To be sure, at an early stage of the legislative process, Congress embraced the general principle that unions should be left free to "operate their own affairs, as far as possible." S.Rep. No. 1684, 85th Cong., 2d Sess. 4-5 (1958). But the LMRDA as finally enacted contains significant restrictions on union self-governance in order to achieve internal union democracy.[5] As this Court has recognized:

> [T]he congressional concern to avoid unnecessary intervention was balanced against the [goal of] . . . assuring that union elections would be conducted in accordance with democratic principles . . . . "Congress, although committed to minimal intervention, was obviously equally committed to making that intervention, once warranted, effective in carrying out the basic aim of Title IV."

Wirtz v. Hotel, Motel & Club Employees, Local 6, 391 U.S. 492, 496 (1968), *quoting Wirtz v. Local 153, Glass Bottle Blowers*, 389 U.S. 463, 473 (1968).

Petitioners would effectively remove from the LMRDA the very campaign mailing rights that Congress regarded as essentia' to democratic self-governance --

[4] "Every bona fide candidate shall have the right, *once within 30 days prior to an election* . . . to inspect a list containing the names and last known addresses of all members of the labor organization . . . ." 29 U.S.C. §481(c)(emphasis added).

[5] Thus, the principles of the Senate Report are not a valid guide to interpreting the LMRDA. Levy, "Legal Responses to Rank-and-File Dissent: Restrictions on Union Officer Autonomy," 30 Buffalo L.Rev. 663, 684 n.118 (1981); Goldberg, "Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement," 1989 Duke L.J. 903, 938.

thereby exacerbating the overwhelming advantages of incumbency in union elections that the Act was designed to eliminate.[6]

II. UNION LIMITATIONS ON CANDIDATE MAILINGS OF CAMPAIGN LITERATURE UNDERMINE THE LMRDA'S LEGISLATIVE PURPOSE OF LEVELING THE PLAYING FIELD BETWEEN CHALLENGERS AND INCUMBENTS IN UNION OFFICER ELECTIONS

A. The LMRDA's Legislative Purpose Was To Level The Playing Field Between Challengers And Incumbents

The LMRDA was enacted to help alleviate two serious and related problems within the labor movement: the corruption and racketeering that had been exposed by the McClellan Committee (the Select Senate Committee on Improper Activities in the Labor or Management Field), and the autocracy and lack of democracy that characterized the internal governance of many unions. *See* S.Rep. No. 187, 86th Cong., 1st Sess. 2 (1959), *in* 1 NLRB, Legislative History of the LMRDA 398 (1960) (hereinafter "Leg.Hist."). Congress recognized that entrenched union officers often become antidemocratic, *see* H.Rep. No. 741, 86th Cong., 1st Sess. 1-2 (1959), *in* 1 Leg.Hist., *supra*, at 759-60. It therefore chose to regulate union elections so as to "end[] . . . autocratic rule by placing the ultimate power in the hands of the members, where it rightfully belongs, so that they may . . . bring about a regeneration of union leadership." 2 Leg.Hist., *supra*, at 1099 (remarks of Senator McClellan).

Accordingly, the decisions of this Court have consistently recognized both the substantial advantages incumbents enjoy in union elections and the intent of Congress in enacting the LMRDA to reduce those advantages as a means of lessening the abuses that Congress found so frequently to be associated with entrenched leadership. The Court's most direct treatment of these issues was in *Wirtz v. Local 153, Glass Bottle Blowers*, 389 U.S. 463. The Court held in that case that a Department of Labor challenge to a 1963 election of union officers was not rendered moot by the fact that the defendant union had conducted another unsupervised election of officers in 1965, before the challenge to the first election could be resolved. The Court recognized that "only a supervised election could offer assurance that the officers who achieved office as beneficiaries of violations of the Act [in 1963 had] not by some means perpetuate[d] their unlawful control in the succeeding election." 389 U.S. at 474. The Court explicitly based that conclusion on "the abuses surfaced by the extensive congressional inquiry showing how incumbents' use of their inherent advantage over potential rank and file challengers established and perpetuated dynastic control of some unions," *id.* -- some of the very abuses "upon which Congress rested its decision that the legislation [the LMRDA] was required in the public interest." *Id.*, *citing* S.Rep. No. 1417, 85th Cong., 2d Sess. 711-12 (1958). "Congress," the Court continued, ". . . considered the risk of incumbents' influence to be substantial, not a mere suspicion." 389 U.S. at 475.

Similarly, in *Wirtz v. Hotel Employees*, 391 U.S. 492, the Court struck down unduly restrictive candidacy requirements because they "can result in the abuses of entrenched leadership that the LMRDA was expressly enacted to curb." 391 U.S. at 499. Indeed, so great was Congress' intent to eliminate the corruption and autocra-

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[6] Absent democratic self-governance, unions have experienced far more drastic government intrusions in the form of civil RICO trusteeships and similar remedies. *See, e.g., United States v. Local 560, International Brotherhood of Teamsters*, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986); *see generally* Goldberg, *supra*.

cy that it had seen so often result from incumbency that the Court in *Hotel Employees and Local 3489, United Steelworkers v. Usery*, 429 U.S. 305 (1977), concluded that the LMRDA's goal of free and democratic union elections was "a preventive measure 'to curb the possibility of abuse by benevolent as well as malevolent entrenched leaderships.'" 429 U.S. at 309, *quoting Hotel Employees*, 391 U.S. at 503.

Petitioners suggest that the Court's decision in *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982), represents a retreat from the Court's previous concern over the advantages of incumbency, Pet. Br. at 16 n.3. That is not the case. In upholding a union ban on outsider contributions to union election campaigns, it is true that the Court did not go as far as the four dissenters would have in construing the Act to assist nonincumbent candidates.[7] However, the majority nevertheless expressly acknowledged that "there are undoubtedly advantages to incumbency," 457 U.S. at 115, and that "the ability of insurgent union members to wage an effective campaign [is] an interest deserving some protection under the statute." *Id.* at 112. Most important in the context of the present case, the *Sadlowski* majority viewed bans on outsider contributions as furthering congressional intent to protect unions from being "'invaded' or 'infiltrated' by outsiders" and "to ensure that union members, and not

[7] The dissenters argued that even "in the best of circumstances, the role of the challenger is very difficult. And if one keeps in mind that *Congress intended to give the challenger a fair chance even in a union controlled by unscrupulous leaders with an iron grip on the staff and a willingness to employ means both within and without the law*, it is wholly unrealistic to confine the challenger to financial support garnered within the union." 457 U.S. at 128 (White, J., dissenting)(emphasis added). It is even more unrealistic to confine a challenger's campaign mailings to a period near the very end of an election campaign. By that time, nominations are closed, slates have been assembled, commitments have been made, alliances formed -- and, all too often, the minds of the voters already made up.

outsiders, control the affairs of their union." *Id.* at 116, *quoting* Senator McClellan, 2 Leg.Hist., *supra*, at 1097-1100. In this case, however, the restriction on campaign activity functions not to protect unions from outside domination but, as argued below, only to limit radically and unnecessarily the period during which meaningful and informed debate over campaign issues can take place.

B. The Advantages Of Incumbency Are Particularly Overwhelming In Union Elections

Recognizing that labor laws concretely affect the lives of millions of working people, this Court has repeatedly emphasized the importance of rooting its labor law decisions in "the realities of labor relations." *Del-Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 167 (1983); *see also Humphrey v. Moore*, 375 U.S. 335, 358 (1964)(Goldberg, J., concurring). Accordingly, an examination of the realities of union elections is appropriate, and it demonstrates the overwhelming advantages incumbent officers almost always enjoy over their challengers.[8]

The scholarly literature examining elections of union officers is unanimous in concluding that incumbent officers have an overwhelming advantage over their chal-

[8] Although this brief speaks in terms of the advantages of incumbency, the analysis also applies to those elections where no incumbent is seeking reelection, but where one candidate has the endorsement of the retiring incumbent, from which usually follows the support of the incumbent's political machine and therefore many of the advantages of incumbency itself. This was the case, for example, in the 1977 Steelworkers election between Lloyd McBride, the candidate endorsed by outgoing president I.W. Abel, and Ed Sadlowski, the candidate cast in the role of challenger. *See United Steelworkers v. Sadlowski*, 457 U.S. at 104; James, "Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections," 13 Harv. C.R.-C.L. L.Rev. 247, 340-51 (1978).

lengers in even the most honest of unions. *See, e.g.*, S. Lipset, M. Trow & J. Coleman, *Union Democracy* 9-10, 147-48, 229-33, 266-68 (1956); M. Estey, *The Unions: Structure, Development and Management* 62 (3d ed. 1981); D. McLaughlin & A. Schoomaker, *The Landrum-Griffin Act and Union Democracy* 35, 37 (1979); J. Wallihan, *Union Government and Organization* 116 (1985); James, *supra*, at 270-83; Summers, "Democracy in a One-Party State: Perspectives From Landrum-Griffin," 43 Md.L.Rev. 93, 96-99, 113-14 (1984); Note, "Union Elections and the LMRDA: Thirteen Years of Use and Abuse," 81 Yale L.J. 407, 419-20 (1972).

Professor Clyde W. Summers, one of the nation's leading authorities on union democracy, has cogently explained some of the ways in which incumbents maintain their advantages in union elections, even when in technical compliance with the election provisions of the LMRDA:

> The [incumbent] . . . inevitably retains great advantages in mounting election campaigns. The union newspapers cannot be used during the election period, but in the period between elections the incumbents have a press monopoly. The newspaper must maintain a pretense of neutrality during the weeks immediately before an election, but it can be, and is, used to praise the officers and their policies in the years between elections. Paid employees cannot campaign on working time except, in the words of the Secretary of Labor, "campaigning incidental to union business." For staff representatives or business agents who are in constant contact with members, "incidental" campaigning may be pervasive, and because their function is to handle grievances, negotiate agreements, and otherwise be of service to the members, their campaigning is particularly effective. Many of the paid staff normally work long and irregular hours. If they do not campaign during the nine to five forty-hour week, they will still have many working hours left in which to campaign. There is no limitation on campaigning by those who have been given unpaid, but much sought after, committee assignments or other prestigious positions.
>
> Beyond these nearly overwhelming organizational advantages, the incumbents have equally overwhelming advantages in raising funds to conduct the campaign. The paid staff is asked to contribute generously, and they understand that their salary is paid with a lien for generous amounts . . . .
>
> Opposition groups have no remotely comparable organization or source of funds.

Summers, *supra*, at 113-14 (footnote omitted). Incumbents can reinforce these enormous advantages by making staff appointments understood by all to be dependent upon staff donations of time and money to the incumbents' reelection campaigns, *Finnegan v. Leu*, 456 U.S. 431 (1982), and by promulgating union rules forbidding challengers from raising campaign funds from nonmembers. *United Steelworkers v. Sadlowski*, 457 U.S. 102.

These advantages of incumbency are not merely theoretical. That is reflected in the low turnover rates documented among top officers of national unions like petitioners in this case. *See* Estey, *supra*, at 62-63;

Wallihan, *supra*, at 116. Even when officer turnover does occur, it is rarely at the expense of an incumbent:

> Much has . . . been made of . . . leaders who hold office for life or until they chose to step aside. Those aspiring to higher leadership positions can either wait their turn or try to unseat a presumably well-organized and visible incumbent. In most cases, the first path is followed, and most office-seekers advance, as did many of the current leaders, through "dead man's shoes."

Quaglieri, "The New People of Power: The Backgrounds and Careers of Top Labor Leaders," 9 J.Lab.Res. 271, 279 (1988).[9]

C. Opportunities For Early Mailings Of Campaign Literature Are Essential If Challengers Are To Have Any Chance Of Overcoming The Advantages Of Incumbency Typically Enjoyed By Their Opponents

Control over the means of communication with the membership is perhaps the most important of the many advantages enjoyed by incumbents in union election campaigns. This was succinctly explained in a now classic study of union democracy:

> [A] major source of administrative power in most organizations is the administration's exclusive control over the formal channels of communication

[9] Officer turnover is generally greater at the local union level, but among local officers, turnover rates drop by nearly one-third among the better paid, who are typically the top officers of large locals. *See* Applebaum & Blaine, "Compensation and Turnover of Union Officers," 14 Indus.Rel. 156 (1975).

> with the members. Ordinarily a union administration's control of the union newspaper, local meetings, and international conventions, and its own full-time staff whose members are paid to travel around and talk to local members and leaders, amount to a near monopoly of the channels of communication to the membership . . . . [S]uch monopolization of the channels of communication, with the consequent absence of counter-propaganda, is one of the basic conditions for the effectiveness of propaganda. This condition . . . is indigenous to totalitarian states; it is also characteristic of the one-party structure of most labor unions.
>
> Such a monopoly over the internal channels of communications works to reduce the expression of disaffection among the membership, and thus to minimize the political effect of what disaffection there is. On the one hand, the only facts and viewpoints bearing on union matters that are widely available to the membership under such conditions are those disseminated by the administration. Official policy is justified, while alternative proposals or programs, if mentioned at all, are discredited. On the other hand, even if the membership is not convinced of the correctness and efficiency of administration policies and there is widespread discontent, the discontent remains atomized, privatized, or restricted to small politically irrelevant groups, and is not focused and organized behind

—a single set of alternative proposals.

Lipset, Trow & Coleman, *supra*, at 260-61.

This domination of the union press by incumbent officers was specifically brought to the attention of Congress by no less an authority than Professor Archibald Cox, who participated in the drafting of the Act as a consultant to Senator John F. Kennedy, the chair of the Senate Subcommittee on Labor. *See* A. McAdams, *Power and Politics in Labor Legislation* 77, 244 (1964) (describing Cox's role). As Professor Cox testified, the consequences of that domination are particularly troubling in the context of referendum voting for officers of national unions, like petitioners in this case: "[I]n a referendum, [the opposition] must build up national popularity in competition with the only names well known to all the members; and the incumbents control the union newspaper which is the chief vehicle for communication with the members." *Hearings on S.505 Before the Subcommittee on Labor of the Committee on Labor and Public Welfare*, 86th Cong., 1st Sess. 134 (1959).

The §401(c) requirement at issue in this case, that unions comply with reasonable requests by candidates to mail campaign literature to the membership at the candidate's expense, was thus an important part of Congress' response to the problem of incumbent monopolization of union communication channels. That provision, therefore, should be interpreted in a manner that will reduce those advantages of incumbency, not increase them. *Cf. Wirtz v. Local 153, Glass Bottle Blowers*, 389 U.S. at 468 (the LMRDA should be interpreted "in light of the general objectives Congress sought to achieve"); *United Steelworkers v. Sadlowski*, 457 U.S. at 121-22 (a question about Congress's intent in enacting a provision of the LMRDA is "best answered by identifying the problem that Congress intended to solve by adopting the provision")(White, J., dissenting).

An interpretation of §401(c) that would deny candidates for union office the opportunity to communicate, at their own expense, with the union's membership through campaign mailings *at any time* after they have declared their candidacies would thus undermine that provision's legislative purpose by limiting challengers' access to the very resource -- an ability to communicate with the electorate -- that Congress intended them to have in order to overcome the advantages of incumbency that result from control over union media. It is impossible to overstate the importance of the right of candidates to mail campaign literature to the membership pursuant to §401(c), particularly in large locals and in regional and national union elections where there is no other way to reach the entire membership. Indeed, a study sponsored by the Department of Labor reported that challengers who defeat incumbents in union elections most often credit "the campaign literature mailing right alone [as] spell[ing] the difference between victory and defeat for them." McLaughlin & Schoomaker, *supra*, at 21. *See also* L. Sayles & G. Strauss, *The Local Union* 83 (rev. ed. 1967)(in contested union elections, "a given candidate's chances for success depend to a considerable extent upon his communications opportunities").

A candidate's right to mail campaign literature will only be effective, however, if that right can be exercised throughout the campaign, including during its formative stages. This is so because "the skillful incumbent," through control of the union's media, "will try to establish an image of invincibility *prior to* commencement of an election campaign," in order to discourage potential challengers from running, and to foster a belief among the membership that it would be futile and perhaps foolhardy to support any challengers who do emerge. Jacobs & Spring, "Fair Coverage in Internal Union Periodicals," 4 Indus.Rel.L.J. 204, 218 (1981)(emphasis in original). As one might expect, it is also the case that "the most secure [union officials], politically, are those

who campaign twelve months a year." Strauss, "Control by the Membership in Building Trades Unions," *in Unions and Union Leadership* 176, 186 (J. Barbash ed. 1959). Thus, the reality is that most incumbent union officers, like most elected public officials, in effect begin their reelection campaigns the day after they take office. It is crucial, therefore, that challengers have a meaningful opportunity for early campaigning as well. In *Wirtz v. Hotel Employees*, this Court noted that "Congress' model of democratic [union] elections was political elections in this country . . . ." 391 U.S. at 504. In the context of such political elections, it is well understood that "early [campaigning can] afford greater exposure to the public for candidates who were not particularly well known, thus enabling them to gradually build voter recognition." Ifshin, "An Analysis of the Impact of the Federal Election Campaign Act on the 1976 Democratic Presidential Primary," 18 Santa Clara L.Rev. 1, 31 (1978). Indeed, the importance of early campaigning was expressly recognized by Congress in §408(c) of the Federal Election Campaign Act, which subsidizes campaign expenses incurred by presidential candidates as long as *22 months* before the election. 26 U.S.C. §9034. There is no justifiable reason why candidates for union office should be prohibited from campaigning, at their own expense, for just as long.

The need for early communication with the members is even more necessary because most unions, as this Court has recognized, have no "permanent 'opposition party' within the union." *Local 3489, United Steelworkers v. Usery* , 429 U.S. at 311. Instead, "[t]here is only a one-party system consisting of the union's incumbent officers and hired staff all controlled from the top down." *United Steelworkers v. Sadlowski*, 457 U.S. at 128 (White, J., dissenting). Even where an opposition group exists, it typically has "no stable organizational structure, no officers or staff, no patronage, no established channels of communications, and little resources. At best, it is a

loose coalition . . . ." Summers, *supra*, at 105.

To have any chance of success in these circumstances, challengers must have an opportunity to begin reaching the membership with their message early in a campaign, long before candidates are formally nominated. "Educating union members about the merits of a political platform inherently takes . . . time." Nyden, "Democratizing Organizations: A Case Study of a Union Reform Movement," 90 Am.J.Soc. 1179, 1193 (1985). Moreover, in the absence of a permanently organized opposition party, as the Court noted in *Local 3489, Steelworkers*, "opposition to the incumbent leadership is likely to emerge *in response to particular issues at different times*." 429 U.S. at 311 (emphasis added). Just as this fact supported the Court's *Steelworkers* decision to strike down a candidate eligibility rule because it unrealistically *required* potential candidates to begin planning their campaign too soon (eighteen months before the election), *id*., it supports the conclusion that the union's rule here unreasonably *prohibits* opposition candidates from effectively communicating with the membership about important issues until late in a campaign, when there is little time left to mobilize support. Candidates must not be limited to communicating their views on particular issues only during the final days of an election campaign. They must be permitted to circulate their views whenever they believe the issues are of greatest interest to the membership. That may be much earlier, when the issues first arise. That is when challengers can begin laying the foundation for a successful campaign by acquiring name recognition and staking out their positions with the electorate.

Petitioners stress the fact that, in their union, candidates can nominate themselves without any prerequisite showing of membership support. Pre-nomination campaigning, petitioners suggest, is therefore unimportant. Pet. Br. at 24 n.8. But the importance of waging an

effective campaign before nomination is not limited simply to achieving formal nomination. By facilitating the formation of coalitions among diverse opposition elements within the union and by recruiting like-minded members into those coalitions, pre-nomination campaigning also enhances the likelihood that a unified slate of challengers will emerge to unseat incumbents, which substantially improves that slate's prospects for success. Department of Labor regulations and several lower courts have established that members can be "bona fide candidates" for purposes of §401(c) campaign mailings before they are formally nominated, and unions cannot be permitted to nullify that determination. 29 C.F.R. §452.80 (1989); *Cotter v. Helmer*, 692 F.Supp. 313 (S.D. N.Y. 1988); *Morrissey v. Curran*, 356 F.Supp. 312 (S.D. N.Y. 1973); *Yablonski v. United Mine Workers*, 71 L.R. R.M. 2606 (D.D.C. 1969).

Amici urge that candidates for union office be permitted to exercise their §401(c) rights to mail campaign literature to the membership almost *any time* an announced candidate willing and able to bear the cost of a mailing requests one.[10] Requests for mailings should be presumed "reasonable" unless the union can demonstrate that the request imposes unjustifiable logistical burdens on the union. For example, it would be unreasonable for a candidate to refuse to comply with a uniformly applied union requirement that the estimated costs of the mailing be tendered in advance. *See* 29 C.F.R. §452.69 (1989). Similarly, it would be unreasonable for a candidate to deliver campaign literature to the union

[10] This view is consistent with that of experts on union democracy, who suggest that candidates need opportunities to reach the membership for at least six months before an election but caution that "[c]onsidering how early the campaigns begin in [some unions], even this may not be enough." J. Edelstein & M. Warner, *Comparative Union Democracy: Organization and Opposition in British and American* 367 (rev.ed. 1979).

at 9 a.m. and demand that it be processed in time to be sent out in that day's 10 a.m. mail. On the other hand, a union "may not refuse to distribute campaign literature merely because it may have a small staff which cannot handle such distributions for all candidates." *Id.* In such cases, "the organization may employ additional temporary staff or contract the job to a professional mailer and charge the expense incurred to the candidates for whom the service is being rendered." *Id.* Since mailings in large national unions, even at bulk rates, can cost tens of thousands of dollars, *see* James, *supra*, at 279, few candidates will be in a position to exercise their §401(c) mailing rights frivolously, especially in the face of *Sadlowski*-type bans on outsider contributions to their campaigns.

In any event, a candidate's request, as here, for a mailing of campaign literature a mere two months before an election is comfortably within any appropriate definition of what a "reasoned request" might be.

III. OPPORTUNITIES FOR EARLY MAILINGS OF CAMPAIGN LITERATURE FURTHER THE LMRDA'S LEGISLATIVE PURPOSE OF ENABLING UNION MEMBERS TO BE INFORMED ABOUT UNION AFFAIRS

A fundamental assumption underlying the enactment of the LMRDA was that, "Given the maintenance of minimum democratic safeguards *and detailed essential information about the union*, the individual members are fully competent to regulate union affairs." S.Rep. No. 187, *supra*, at 7, *in* 1 Leg.Hist., *supra*, at 403 (emphasis added). Congress was "confident that union members . . . having the benefit of secret elections . . . would rid themselves of untrustworthy or corrupt officers," but that confidence was premised on a membership "*armed with adequate information*." *Id.* at 9, 1 Leg.Hist. at 405 (emphasis added).

In order to "arm" union members with the knowledge they need to make informed decisions about union affairs and to cast informed votes in union elections, Congress repeatedly included throughout the LMRDA reporting, disclosure, and free speech provisions that together amount to nothing less than a union member's "right to know." *See, e.g.*, LMRDA §104, 29 U.S.C. §414 (member's right to copies of collective bargaining agreements); *id.* at §105, 29 U.S.C. §415 (obligation of unions to inform members of their rights under the Act); *id.* at §201(a), 29 U.S.C. §431(a)(obligation of unions to adopt detailed constitutions and bylaws and make them available to the members); *id.* at §201(b), 29 U.S.C. §431(b) (financial reports of unions and union officers); *id.* at §201(c), 29 U.S.C. §431(c)(member's right to examine union and officer financial reports and, "for good cause," any union books, records, and accounts); *id.* at §301, 29 U.S.C. §461 (trusteeship reports); *id.* at §401(c), 29 U.S.C. §481(c)(candidates' right to inspect union membership lists); *id.* at §501(b), 29 U.S.C. §501(b)(member's right to an accounting).

The union member's right to know implicit in these reporting and disclosure provisions is rooted further in the equal rights and free speech provisions of Title I's bill of rights for union members.[11] LMRDA §§101(a)(1) & (2), 29 U.S.C. §§411(a)(1) & (2). Lower courts have repeatedly found in the members' Title I rights to vote in union elections or referenda and to speak freely at union meetings or elsewhere about candidates for union office or other aspects of union affairs a right to *informed* voting and *informed* discussion. As one court explained:

> The right to express views in ignorance of facts is a hollow right. Though the ignorance of the member is no basis for suppressing his views, a union can hardly be said to be affording a member the right to "express . . . views, arguments, or opinions . . . upon any business" of the union when a union deliberately . . . keeps its members in ignorance.

Daniels v. Post Office Mail Handlers, 454 F.Supp. 336, 339 (E.D.Va. 1978). According to another court, union officers have a fiduciary duty "to see that the lines of communication and dissemination of views and opinions are kept open and working, especially as to matters on which members will be asked to vote." *Blanchard v. Johnson*, 388 F.Supp. 208, 214 (N.D. Ohio 1975), *modified on other grounds*, 532 F.2d 1074 (6th Cir.), *cert. denied*, 429 U.S. 869 (1976).

The LMRDA's right to know is particularly important in the context of union referenda. Several courts have implied under Title I, at least under certain circumstances, a union obligation to provide dissidents with the means (at their own expense) of communicating to the membership the dissidents' views on referendum issues. *See, e.g., Rural Letter Carriers, Knox County Local v. Rural Letter Carriers*, 720 F.2d 936 (6th Cir. 1984)(union must allow local opposed to ratification of collective bargaining agreement to advertise in union's magazine); *Lodge 1389, B.R.A.C. v. Dennis*, 625 F.2d 819 (9th Cir. 1980)(local union stated claim cognizable under §101 (a)(2) when it sought access to national union's membership list for purposes of campaigning for membership ratification of a proposed amendment to the national union's constitution); *Sheldon v. O'Callaghan*, 497 F.2d 1276 (2d Cir.), *cert. denied*, 419 U.S. 1090 (1974)(union required to give dissidents' mailing service access to

[11] This Court has indicated that Title IV should be interpreted in light of the provisions of the subsequently added Title I precisely because Congress feared that Title IV did not provide sufficient protection to union members. *United Steelworkers v. Sadlowski*, 457 U.S. at 117 n.10. *See also Local 82, Furniture and Piano Movers v. Crowley*, 467 U.S. 526, 556 (1984)(Stevens, J., dissenting).

union membership list); *Cotter v. Helmer*, 692 F.Supp. 313 (relying on §101(a)(2) as well as §401(c) to grant candidate pre-nomination mailing rights related not only to the business manager election but also to a vote at a membership meeting on incumbent business manager's proposal that candidate be removed from assistant business manager position); *Blanchard v. Johnson*, 388 F. Supp. 208 (members opposing incumbents' proposal have right to distribute literature through independent agency conducting the referendum).

In the context of union officer elections, deference to Congress' remedial purpose of promoting informed discussion and informed voting requires that §401(c) be construed to permit candidates to mail campaign literature during the crucial early stages of a campaign, when key issues are starting to emerge, candidates are assembling their slates, and voters' minds are still open. *Cf. Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980)(remedial legislation should be liberally construed). Discussions of union policies and programs become most meaningful when they are linked to election contests. When members believe it is actually possible to affect policy by electing or defeating candidates who are pledged to specific policies, all discussions are brought from a level of abstraction to one of concrete possibility. Members are aroused to take an interest in union affairs when they realize that they can implement a program by electing candidates pledged to that program. By putting forth his or her candidacy, a union member makes clear that he or she is not simply blowing off steam but is serious about his or her proposals and intends to carry them out. Such conditions stimulate democratic discussion by the entire membership, and the democracy in unions that Congress intended to promote with the LMRDA grows stronger.

IV. PETITIONERS' RULES RESTRICTING A CANDIDATE'S RIGHT TO MAIL CAMPAIGN LITERATURE ARE ENTITLED TO NO DEFERENCE BECAUSE THEIR ANTIDEMOCRATIC EFFECTS FAR OUTWEIGH ANY LEGITIMATE UNION INTERESTS THEY MAY SERVE

Amici contend that the reasonableness of a candidate's request for the mailing of campaign literature should be determined without regard to inconsistent union election rules. If, however, this Court concludes that some deference is due union rules in this context, the appropriate test for judging the reasonableness of those rules can be found in *Local 3489, United Steelworkers v. Usery*, 429 U.S. 305. In that case, involving the "reasonable qualifications" that §401(e) permits unions to establish for union members to be eligible to run for union office, the Court held that reasonableness must be determined by balancing "the antidemocratic effects of the . . . rule [against] . . . the [union] interests urged in its support." 429 U.S. at 310.[12]

In applying this test, courts must be aware of the fact that many of the antidemocratic consequences of the one-party system that produce electoral advantages for incumbents are also at work when incumbents put forward electoral rules that limit efforts by challengers. For

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[12] This test is consistent with that developed in the analogous context of the internal union affairs proviso found in §8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. §158(b)(1)(A). That proviso shields unions from unfair labor practice charges when they discipline members for violating union "rules with respect to the acquisition or retention of [union] membership." In *Scofield v. NLRB*, 394 U.S. 423, 430 (1969), the Court held that the proviso applies only when the union rule in question "reflects a legitimate union interest" and "impairs no policy Congress has imbedded in the labor laws." In applying the *Scofield* test, the NLRB and the courts have consistently found union rules that undermine the LMRDA to be outside the protection of §8(b)(1)(A)'s proviso. *See, e.g., Helton v. NLRB*, 656 F.2d 883, 893 -96 (D.C.Cir. 1981)); *Carpenters Local 22*, 195 N.L.R.B. 1 (1972).

that reason, union restrictions on challengers' abilities to campaign effectively must be "strictly scrutinized and stringently tested." Summers, *supra*, at 116.

The antidemocratic effects of the union's rule in this case are substantial, and they easily outweigh the relatively minor union interests urged in its support by petitioners. As argued previously, under even the best of circumstances, opportunities for early mailings of campaign literature are essential to further the LMRDA's legislative purpose of leveling the playing field between challengers and incumbents in union officer elections. In maritime unions like the petitioner union, where members are dispersed and isolated on ships all over the globe for months at a time because of the nature of their work, the need for early campaign mailings is even greater if challengers are to have any chance of overcoming the advantages of incumbency enjoyed by their opponents.

The union's rule in this case prohibits §401(c) mailings of campaign literature until the final days of a campaign and therefore operates to deny the union's scattered membership any meaningful opportunities to have informed discussions among themselves about the candidates and the issues at stake in the election. The union's rule thus produces the overwhelmingly antidemocratic effects of (1) prolonging the incumbents' monopoly over the channels of communication with the membership, (2) crippling the efforts of challengers to form coalitions and generate a unified slate of candidates, and (3) forcing the members to cast their ballots without the benefit of informed discussion and debate.

Only the strongest of union interests would be sufficient to outweigh the antidemocratic effects of the union's rule in this case, and the interests identified by petitioners and *amicus* AFL-CIO do not even come close. Certainly the cost of postage or processing is not a factor justifying union restrictions on §401(c) mailing

rights, since the statute expressly requires the candidates to bear those costs. Nor can petitioners claim credibly that early or frequent candidate mailings will impose any significant administrative or logistical burdens on the union. Department of Labor regulations make clear that unions with small staffs may hire temporary help to handle the mailings or contract the jobs out to a commercial mailing house, and charge the expenses incurred to the candidates who requested the mailings. 29 C.F.R. §452.69 (1989). Making such arrangements in most cases would entail no more than a few telephone calls.

Petitioners claim that by prohibiting campaign mailings until after candidates are formally nominated and certified, their rule "protects the campaign's integrity . . . [by] restrict[ing] the use of the mailing procedure to actual, eligible candidates." Pet. Br. at 23. Accordingly, they argue, the rule frees them of the burden of having to "continuously assess" candidates' requests for mailings, forcing the union's officers to "tak[e] time from their other important responsibilities." *Id.* at 24. That argument, however, is largely premised on the faulty assumption that only candidates who have been formally nominated are entitled to campaign mailings under §401(c). Once that assumption is abandoned -- as it must be in accordance with Department of Labor regulations and court decisions, *supra*, at p.20 -- there is very little left for a union legitimately to "assess" in responding to a candidate's request that his or her campaign literature be mailed to the union's membership. All the union need consider is whether the candidate has declared his or her intent to seek office and whether the candidate has complied with such reasonable mailing related rules as requirements that the candidate tender payment for the estimated costs of the mailing in advance. Determinations that candidates meet the union's reasonable qualifications for office will have to be made sooner or later for every candidate in any event. If a union believes it is more efficient to postpone those

determinations until such time as candidates are formally nominated, nothing in §401(c) would prevent it from doing so, as long as announced candidates are not deprived of their mailing rights in the meantime.

Petitioners and *amicus* AFL-CIO also argue that the union's rule in this case is reasonable because it promotes uniformity in the handling of candidates' requests for mailings, thereby reducing the risks of discrimination inherent in *ad hoc* decisionmaking. As the court explained in *Alvey v. General Electric Co.*, 622 F.2d 1279, 1286 (7th Cir. 1980), however, "[t]he need for uniformity . . . is analytically empty for our purposes because virtually any rule imposed by a . . . union -- even rules improperly based on race, sex, or religion -- would include the characteristic of uniformity." The fatal flaw in petitioners' refusal to honor respondent's §401(c) request to mail campaign literature was not that it was based on a union rule, but that it was based on an *unreasonable* union rule -- one that effectively deprives union members of timely information needed for full and fair decisionmaking, thereby violating the LMRDA and its legislative purpose of leveling the playing field between challengers and incumbents.

Thus, petitioners in this case have failed to identify any legitimate union interests served by their restriction on candidates' campaign mailing rights that can outweigh the very substantial antidemocratic effects of those restrictions.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the judgment of the court below.

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